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THE
REVISED REPORTS

BEING

A REPUBLICATION OF SUCH CASES

IN THE

ENGLISH COURTS OF COMMON LAW AND EQUITY,

FROM THE YEAR 1785,

AS ARE STILL OF PRACTICAL UTILITY.

EDITED BY

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ASSISTANT READER IN EQUITY IN THE LANE OF COURTY.

BARRISTERS-AT-LAW.

VOL. V.

1799-1801.

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PREFACE TO VOLUME V.

WE may now be said to be in the full stream of modern reporting, but the Exchequer still contributes very little. A third of this century had to pass before the Court of Exchequer, reinforced by Parke and Alderson, finally asserted its equality in substance as well as in form with the King's Bench and the Common Pleas. Among the Equity cases in the present volume, *Ex parte Ruffin*, *Evans v. Bicknell*, and *Gibson v. Jeyes*, embodying principles of wide and permanent importance, may still be deemed classical. The learned reader's attention is specially called to Mr. Campbell's warning note, at p. 715, as to the value of Espinasse's Reports. Attention is also called, with reference to *Folkingham v. Croft*, 4 R. R. 844, to the note on *Morgan v. Slaughter*, at pp. 715—716.

In this, as in former volumes, we have not always thought ourselves bound to correct the quaint elliptical phrases of the original head-notes where the sense was reasonably clear, and especially where the language of

the head-note is taken from the judgment itself. *Hope v. Lord Clifden*, p. 364, is an example.

References to the Law Times, as well as the Law Journal Reports, have been given for most of the later cases cited in our notes.

F. P.

JUDGES

OF THE

HIGH COURT OF CHANCERY.

1799—1801.

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LORD ELDON, 1801—1806		
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SIR WILLIAM GRANT, 1801—1818 . . .		

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LORD ALVANLEY, 1801—1804		
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SIR FRANCIS BULLER, 1794—1800 . . .		
SIR ALAN CHAMBRE, 1800—1815		

* Refused to be knighted.

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HON. SPENCER PERCEVAL, 1801—1802 . . .		

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The Revised Reports.

VOL. V.

CHANCERY.

MIDDLETON *v.* MESSENGER.

(5 Vesey, 136—140.)

Bequest to the testator's wife for life; then, after an appropriation to answer annuities, to the children of the testator's brothers and sisters. All the children living at the death of the testator and those born afterwards before the death of the wife had vested interests; a codicil in favour of the same objects, only restrained to those surviving at the time of distribution, being held to apply only to the capital of the fund appropriated to the annuities.

JOHN MESSENGER by his will, dated the 17th of March, 1785, after directing his debts to be discharged, proceeded thus :

“ Item, I give and bequeath unto my well-beloved wife Lydia Messenger, all the interests of my money arising from the 8 per cent. Consolidated Funds, and also the profits arising from all my estates whatsoever, and the use of all my household furniture, during the term of her natural life ; and at her decease I give to my daughter-in-law Ann Little the interest arising from 1,500*l.* for her sole use during her natural life ; but to stand in my name deceased ; and if any misfortune by sickness or lameness should attend the said Ann Little, that she may at any time hereafter be rendered incapable of going to receive her interest money, my will is, that she appoint by letter of attorney a person to receive the same : Item, I give and bequeath unto my sister O'Brien and to my sister Charlewood ten guineas annually each, being the interest of 700*l.*, to stand in my name deceased : The

1799.

Dec. 5, 9.

Rolls Court.
ARDEN, M.R.

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MIDDLETON v. MESSENGER.
[*137] *remainder of money in the funds and all my estates of every kind or nature whatsoever to be sold by a fair auction, and the sums of money arising therefrom to be equally divided among brothers' and sisters' children (Susan Charlewood excepted) to whom I bequeath one shilling."

He then gave some mourning rings, and to John Middleton and George Odel ten guineas each; and he appointed them executors.

The testator afterwards made the following codicil :

"As the legatees die the benefit of the interest monies to go into the family of my brothers' and sisters' children then surviving equal share and share alike."

The testator died upon the 3rd of June, 1786. Besides stock and household furniture he was possessed of leasehold estates. His widow received the interest and dividends of his 3 per cent. Annuities and the profits arising from all his estates, and had the use of all his household furniture, during her life. She died upon the 12th of May, 1795. The annuitants named in the will survived her.

The bill was filed by the executors to have the accounts taken, and the claims of the parties ascertained; and by a decree made at the Rolls upon the 12th of December, 1786, the accounts were directed; and an inquiry, who were the brothers and sisters of the testator; whether they had any and what children living at the time of his death; if any were dead, who were their personal representatives; and whether any of them (except Susan Charlewood), were living at the death of the testator's widow.

The Master's report specified the brothers and three sisters of the testator; and stated, that several of their children were living at the testator's death; and some of them died before the death of his widow. None were born after the testator's death.

By another decree, pronounced upon the 16th of February, 1798, it was directed, that 1,500*l.* 3 per cent. Consolidated Bank Annuities, part of 3,350*l.* standing in the name of the testator, should be carried to the account of the defendant Ann Little, and the *interest to be paid to her for her life; and it was declared, that upon her death the said 1,500*l.* would belong to such of the

children of the testator's brothers and sisters (except Susan Charlewood) as should be living at the death of Ann Little. The decree farther directed, that 700*l.*, other part thereof, should be carried over in manner following : viz. 350*l.* to the account of the testator's sister, the defendant Sarah Clempson (formerly O'Brien) ; and the interest thereof should be paid to her for life ; and 350*l.*, the other moiety, to the account of his sister Anne Charlewood ; and the interest thereof be paid to her for life : and it was declared, that the said two sums would belong to such of the children of the testator's brothers and sisters (except Susan Charlewood) as should be living at the respective deaths of Sarah Clempson and Anne Charlewood. Some inquiries were directed as to James Messenger, a brother of the testator ; who went to sea in 1785 ; and had not since been heard of. Advertisements were published for his children : but none came in.

MIDDLETON
v.
MESSENGER.

The cause coming on for farther directions, the question was, whether the general residue belonged exclusively to the children of the testator's brothers and sisters (except Susan Charlewood), who were living at the death of the widow ; or whether children, who died between the death of the testator and the death of his widow, were entitled with the others. The counsel for the plaintiffs were directed by the Court to support the point in favour of all the children living at the death of the testator.

Mr. Lloyd, Mr. Graham, Mr. Fonblanque, and Mr. Benyon,
for the children living at the death of the testator's wife.

Upon the will taken without the codicil it would be too clear for argument, upon the authorities, that it would have vested in the children living at the death of the testator, as well as at the death of the wife. But the question arises upon the will coupled with the codicil. The codicil must mean children surviving at the death of the legatee ; and the effect of it cannot be restrained to the annuitants only : but it relates to every person taking an interest under the will ; the testator's wife as well as the others. There is no ground for confining the operation of the codicil to the annuitants, excluding the widow. It is impossible, that the

MIDDLETON ^{v.} testator could use this language without intending to vary
 MESSENGER. the bequest. The words must *have their effect; and they
 [*139] cannot be applied to the contingency of a child dying in the
 life of the testator. It was unnecessary for him to express,
 that they should be living at his own death. The law does that.

Mr. Richards and *Mr. Grimwood*, for the representatives
 of the children, who died between the deaths of the tes-
 tator and his widow :

This is a gift of the residue to the testator's wife for life ; for
 the old distinction between a gift of the interest or use of a thing
 and of the thing itself does not now prevail. He gives her the
 interest of his property of every denomination whatsoever for her
 life, and the use of his household furniture. Then he distin-
 guishes it into portions ; and makes this disposition ; the
 effect of which is, that after her death he takes from the
 residue certain parts ; and the residue of that residue he gives
 to the children of his brothers and sisters. The expression
 “ interest monies ” in the codicil cannot apply to all, that was
 given to his wife ; for he also gave her the use of his furniture
 and the profits of all the rest of his property. She cannot be
 considered a legatee in the common acceptation of the word. The
 word “ legatees ” in the codicil must apply to those, who only can
 be properly considered legatees, viz. the annuitants in contradic-
 tion to residuary legatees.

Dec. 9.

MASTER OF THE ROLLS :

I have looked over this will with much attention ; and I do
 not say, I have not some doubt upon it ; and that I have not in
 some degree changed my opinion in the consideration of the
 question. But upon the whole will taken together with the
 codicil I am of opinion, the codicil upon the true construction is
 not explanatory, but restrictive ; a distribution only of so much
 as had by the will been appropriated ; the interest of which he
 had given in different proportions to Ann Little, Sarah Clemp-
 son, and Anne Charlewood. By the will making no farther dis-
 position of the 1,500*l.* and 700*l.* so appropriated, which are still

to stand in his name, he proceeds to dispose of the remainder of his money in the funds and all his other property after those appropriations. I understand, he had several leasehold estates. It appears to me upon the face of the will, and according to the construction put upon words of division at the deaths of tenants for *life and the authority of *De Visme v. Mello*,† that the remainder of his money in the funds and the produce of all his other estates, when sold, were divisible among all the children of his brothers and sisters, except Susan Charlewood, living at his own death, and such, if any, as might be born before the death of his wife, and the representatives of such as should be dead in the life of his wife. That is fully established in that case; in which every circumstance contained in this occurs. It is clear upon that case, to which I perfectly subscribe, that under such a disposition the fund is divisible among such of the objects, as are living at the testator's death, and such as shall be born, before the fund is distributable; and that they are vested interests. If that is the true construction of this will, and it is clearly so, if *De Visme v. Mello* is right, the question is, to what the codicil relates; and it was contended, that it related, not only to the sums appropriated to the annuitants, but that it was explanatory of the words the testator used, when speaking of the remainder of his money in the funds, after that appropriation, and all his other estates; to restrain the disposition, as it does, as far as it relates to the subject of it, to children then surviving. But upon the true construction of this codicil I am of opinion, it was not to relate to anything but the interest undisposed of by the will; and that the testator did not mean to disturb what was given by the will, but to dispose of what had been left undisposed of, the sums of 1,500*l.* and 700*l.* after the deaths of the annuitants.

Declare, that the residue of the testator's personal estate, after the appropriation of 1,500*l.* and 700*l.* 3 per cent., &c. for satisfaction of the annuities given by the will to Ann Little, Sarah Clempson, and Anne Charlewood, is distributable among the children of the testator's brothers and sisters (except Susan Charlewood) living at his decease, and the representatives of such as died in the life of his wife.

† 1 Br. C. C. 537.

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v.
MESSENGER.

[*140]

1799.
Dec. 13, 23.
Rolls Court.
ARDEN, M.R.

NISBETT *v.* MURRAY.*

MURRAY *v.* NISBETT.

(5 Vesey, 149—158.)

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Residuary disposition of all the testator's real and personal estate in Jamaica, in trust to be remitted to England, was held specific, and not to include a debt, originally upon bond and judgment in Jamaica, and afterwards farther secured by bond and judgment in England, under which it was received, and being considered undisposed of was applied in the first instance to the debts, &c. Executors having legacies of 20*l.* a-piece to buy mourning rings and equal specific legacies were upon the former held trustees of the undisposed of residue for the next of kin.

ROBERT NISBETT of the parish of Westmorland in Jamaica, planter, by his will, dated the 7th June, 1787, and executed in that island, after directing, that all his debts and funeral expenses should in the first place be paid off and satisfied, to the payment of which he subjected all his estates both real and personal, gave and bequeathed to David Murray and John Graham the sum of 20*l.* apiece, to buy mourning rings; and he gave, devised, and bequeathed, to a free mulatto woman, named Anney Gordon, some negroes and slaves, with fifteen acres of land in the said parish, upon which, he ordered, that a house might be built by his executors; to hold the slaves with their issue and the said fifteen acres, with such house, unto Anney Gordon and her assigns during her life; and immediately after her decease he declared it to be his will and desire, that the said slaves with their increase and the said house and land should revert to and become part of the residuum of his estate; and he thereby gave, devised, and bequeathed, the same in the same manner, and for the like purposes, as he thereby gave and devised the rest and residue of his estate. * * And [after certain other specific bequests of property in Jamaica] as to all the rest and residue of his estate both real and personal of what nature or kind soever in the said island of Jamaica, his household furniture and wearing apparel excepted, which he thereby gave to the said Anney Gordon, he gave, devised, and bequeathed, the same unto David Murray and

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* *Guthrie v. Walrond* (1883) 22 Ch. D. 573, 575.

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MURRAY.

John Graham, and the survivor, and the heirs and assigns of such survivor, in trust nevertheless to sell and dispose of the same, as soon as conveniently might be after his decease; and declared that the monies to arise by such sale together with all other monies belonging to his estate, or that should or might belong thereto, should be remitted to Great Britain, there to be lodged by them, Murray and Graham, in some public fund, bank or stock; and the said monies so to be remitted and lodged, as aforesaid, he gave and bequeathed in manner following: that is to say; to his reputed son by Anney Gordon, named Robert Nisbett, 2,000*l.* currency: unto his reputed son Archibald Nisbett, 2,000*l.* currency; and to the reputed son of his brother James Nisbett by Mary Richmond in that part of Great Britain called Scotland, named James Nisbett, the farther sum of 2,000*l.* currency; and the remainder of the said monies, if any there should be, he gave and bequeathed to Murray and Graham: but in case the said monies should not be sufficient to pay to each of them, the said Robert, Archibald, and James Nisbett the said sum of 2,000*l.* a-piece, then he declared his will to be, that the said monies should be equally divided among them, share and share alike; and he appointed Murray and Graham executors.

The testator died soon after the execution of the will. He had no property in Great Britain except the money received in England upon Lewis's debt, hereinafter mentioned, another small debt mentioned in the report, and some leasehold estates in Scotland. The executors took probate both in Jamaica and in England. The bill in the first of these causes was filed by the eldest brother and heir at law of the testator and by another brother and sister. The other bill filed by the executors prayed the accounts; and in case the Court shall be of opinion, that the personal estate and effects of the *testator in this country or in any place out of Jamaica did not pass by the will, then that the same may be declared liable, and be directed to contribute rateably with the personal estate in the island, to the debts.

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[In the course of the administration a question arose whether certain debts originally due to the testator upon bond and judgment in Jamaica, and afterwards further secured by bond and judgment in England were property of the testator in England

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MURRAY.

or Jamaica, the person responsible for the debt being resident in London. The master reported that the debts were property in England. The executors excepted to the report. The facts sufficiently appear from the judgment.

Mr. Richards, Mr. Stanley, Mr. Lloyd, and Mr. Hart for the executors and other parties in the same interest, argued that the debts remained due in Jamaica where the creditor resided.]

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Mr. Piggott, Mr. Graham, and Mr. Pemberton, for the next of kin :

This depends entirely upon the words of the will, not upon any general rule as to the locality of debts. It is true, choses in action have no locality. It is plain, the testator precluded himself from proceeding in Jamaica ; that he expected to receive the debt in England under the new engagement. * *

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Mr. Richards, in reply. * *

MASTER OF THE ROLLS :

I rather think, I cannot hold this to be property in Jamaica, within the testator's contemplation, if I am to give this will any construction. It is a very extraordinary one. Upon the first part, where he directs all his debts to be paid in the first place, and subjects all his estates both real and personal to the payment of them, there is no distinction. He gives the whole to his executors ; for he afterwards makes them general executors. There is no pretence for any distinction ; that the Jamaica debts should affect the Jamaica property, and the English debts the property in this country. He then makes specific dispositions in favour of the mulatto woman and child ; which must be admitted to be part of his Jamaica estate. The locality fixes it. Those are in the events described to become part of his residuary estate ; and then he makes the residuary disposition.

What is the true construction of this will ? I am bound to say, the testator has made these two persons general executors ; for they have obtained probate in this country. I am also bound to say, the words " in the said island of Jamaica " must have some sense put upon them ; and they must control the general

words. It was contended, that they do not mean to restrain the gift to such property as he meant by what he called his property in Jamaica. The next consideration is, whether this debt under the circumstances must be supposed to have been in his contemplation and intention *his property in Jamaica, when he made his will. It must not be forgot, that he has given to his executors only what he meant under the words "in the said island of Jamaica." The rule of evidence must be adhered to; that the *onus probandi* lies upon the executors. They claim this as a specific legacy. Therefore they must shew, the testator did intend it to pass: otherwise it will not. It is said to stand thus; that it was a debt by judgments in Jamaica against William and Matthew Lewis, enforceable there only, and probably the debtors being resident there: but for some years Matthew Lewis had been removed to England; and he became, and now is a person of considerable property in this country. The testator gave his brother a letter of attorney, with full powers authorizing him to get in all debts whatsoever then due, or which should become due, to the testator in Great Britain. In prosecution of those powers an agreement took place between the testator's brother and Matthew Lewis of this nature; settling what was the money remaining due; and instead of those judgments, and as a collateral security, (for I will put it as strongly as that) and for a complete discharge, Matthew Lewis gave this bond and judgment in England, to pay by instalments; and Nisbett covenanted that, if the instalments were so paid, no execution should be taken out either in Jamaica or elsewhere against Matthew Lewis.

This passed in 1784. It is said to have been without the authority of the testator, and not within the general power his brother had. That objection it is not competent to make now; for three years elapsed between that and the date of the will; and three payments were made under it; and it is impossible, that at the time of making the will the testator did not know the situation of that debt in England. As to Matthew Lewis, I take it for granted, there was no debt under the judgment, no breach of the condition by him. It is said so; and I will not suppose the contrary. Then at the time of making the will it must be supposed, the testator contemplates all his affairs; and

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has a definite meaning as to the words he uses. What can he be supposed to mean by the direction of his executors to sell and dispose of his estate, and that the money to arise by such sale, together with all other monies belonging to his estate, or that should or might belong thereto, should be remitted to Great Britain, &c.? Did he include this debt? If he was perfectly cognisant of this transaction, did he look to the payment in Jamaica by Matthew Lewis? He knew *it was a debt, payable by a debtor, who had removed from Jamaica; living in this country; who had given security for payment in this country accepted by his attorney, which is the same as by himself. Therefore at that time it must be supposed he looked for payment in England; and therefore this could not be part of that property, to be collected and remitted to England; and of which the executors and other legatees were to have the benefit. My inclination is in favour of the legatees. But I do not see sufficient to prove, that this formed part of that specific legacy. It might be put another way. If this debt was paid under the last engagement, they could not have received it under an administration in Jamaica, nor have given the debtor a discharge. If he had complied with the obligation, they must have had an administration here. Then it would be a strong thing to say, it passed to them, when they could not by their administration in Jamaica have collected it. I must therefore overrule the exception.

The next question is, whether, if this is the construction, to give every thing in Jamaica under this disposition, and nothing more, and this debt does not fall within that, upon what part the debts are to fall. When I decide this to be specific, the question is decided. The testator had left everything but this specific legacy undisposed of. The executors cannot claim the residue; having equal legacies besides this specific legacy; otherwise a doubt might have arisen, whether this specific legacy would have been sufficient. But the other legacies, though only for rings, will do. They must be trustees of the residue; and they must pay the debts out of that, before even a pecuniary legatee, much less a specific legatee, can be affected.

Overrule the exception. Declare, that the debts are first to

be paid out of such part of the testator's personal estate as is not specifically bequeathed; and that the devise and bequest of the property in Jamaica is to be considered specific. The costs must come out of the residue undisposed of.

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MACLEROTH v. BACON.*

(5 Vesey, 159—168.)

Power to appoint for the benefit of a married woman and her family would not include the husband in general; but upon the whole will an appointment in his favour was established.

1799.
Nov. 11, 12.
Dec. 24.
Rolls Court.
ARDEN, M.R.

[159]

THOMAS LLOYD by his will, dated the 21st of July, 1794, gave to Elizabeth Lacey Rolfe, the eldest daughter of William Rolfe, 1,000*l.* for her own use. He also gave to and for the benefit of Martha, the youngest daughter of William Rolfe, the wife of Hugh MacLeroth, a lieutenant of foot, the like sum of 1,000*l.*; which he directed should be paid by his executors and trustees to the said William Rolfe, if living, for the use and benefit of the said Martha MacLeroth, and to be by the said William Rolfe either settled or limited for her separate use, independent of her husband, and as a provision for her and for the benefit of her children, if the said William Rolfe shall so think fit and direct: or else, the whole or any part of it to be paid and applied for the benefit of his said daughter and her family either immediately or at any future period or periods of time, as the said William Rolfe shall think will, all circumstances considered, be most useful and beneficial to her and her family; and as he shall direct and appoint; and he accordingly willed, that the said Mr. Rolfe shall be at full liberty to direct the manner, in which the said sum of 1,000*l.* shall be applied for the benefit of his said daughter Martha and her family; and that the same shall be paid and applied accordingly. But if the said Mr. Rolfe shall die without making such direction, then the testator willed, that the said sum of 1,000*l.* shall be paid and applied in such manner as the said Martha MacLeroth shall by any writing under her hand executed before two credible witnesses notwithstanding her

* *Talbot v. Marshfield* (1868) L. R. 3 Ch. 622.

MACLEROTH ^{v.}
BACON. coverture and without her husband's joining therein direct or appoint to be applied for the benefit of her and her family; and he willed, that the receipt of the said William Rolfe, if living, or of the person, to whom he shall by writing in his life-time direct the same to be paid, expressing the same to be received by him or them for the benefit of his said daughter Martha MacLeroth, shall be a full discharge to his trustees and executors for the said sum of 1,000*l.* without their being bound to see to the application thereof in any manner. The will then proceeded thus;

[*160] “ And to that end, and in order that the said Mr. Rolfe (who best knows, what will be most beneficial for his said daughter's *interest) may give directions, to whom he wishes the said 1,000*l.* to be paid for her benefit, and in the manner in which he wishes the same to be applied, I have wrote to him, acquainting him of this my intended legacy; and have requested him to leave directions in writing, to whom he wishes the same to be paid, and how he wishes the same to be applied; so that my trustees and executors may at every event pay and be discharged of the said legacy; and may on no account be involved in the trusts thereof, or be any ways answerable for the application or misapplication or non-application thereof.”

The testator died soon after the execution of his will. * * *

[161] The legacy of 1,000*l.* was paid to Rolfe before 1797; and was by him laid out in stock; which stood in his name at his death. [He made a will, but did not exercise the power of appointment which he had over such legacy under the will of T. Lloyd.]

Martha MacLeroth by deed poll, dated the 15th of December, 1798, and attested by two witnesses, reciting the will of Lloyd, and her power under it, in pursuance and performance and by virtue of the power and authority so given, granted, appointed, and directed, the said sum of 1,000*l.* and all and every part thereof, and all interests and dividends thereof, to be paid, applied, and disposed of, in manner and for the purposes, and to the uses and intents following: that is to say; she appointed the sum of 800*l.*, parcel of the said sum of 1,000*l.* to be paid to Hugh MacLeroth, or to such person or persons, and in such manner, and for such purposes, as he shall think fit, and as he shall direct or order; and as to the sum of 200*l.*, residue thereof, she

directed the same to be *laid out in Government securities in the names of the trustees of William Rolfe, in trust to pay the interest and dividends thereof to her for her natural life; and after her decease to permit Hugh MacLeroth to receive the same, if he should survive her, for his life; and after the death of the survivor to divide the capital among all and every their child and children, in such manner as they or the survivor should by deed with two witnesses or by will to be attested in like manner, appoint; in default of appointment, equally; if but one, to that one, his or her executors, administrators, or assigns; and in case the said Hugh MacLeroth shall not accept of, or shall not dispose of, or apply, the said sum of 800*l.* hereby given him, or shall be held or adjudged incapable of taking the same, then and in either of those cases she appointed the said sum of 800*l.*, or so much thereof as Hugh MacLeroth shall not receive or apply, to be laid out in the public funds upon the trusts declared concerning the 200*l.*

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v.
BACON.
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The bill was filed by MacLeroth and his wife against Elizabeth Lacey Rolfe, the executors and trustees of William Rolfe, and the three infant children of the plaintiffs; praying that the plaintiff Martha MacLeroth may be decreed entitled to appoint the said sum of 1,000*l.* for the benefit of herself and family in manner aforesaid; that the said deed and appointment executed by her may be declared valid, and carried into effect; that the sum of 1,000*l.* may be raised and paid by the executors of William Rolfe, and applied according to the said appointment, or otherwise for the benefit of the plaintiff Martha MacLeroth and her family pursuant to the will of Lloyd; and that the will of Lloyd may be established, &c.

Mr. Graham and *Mr. Trower*, for the plaintiffs, contended, that Rolfe having made no appointment, the plaintiff was entitled to appoint this fund; and the appointment she had executed was valid within the power. * *

Mr. Richards and *Mr. Short*, for the infant children of the plaintiffs: [163]

* * * As to the appointment executed by the plaintiff, the

MACLEROTH *v.* BACON. [*164] clear intention was, that this fund should be applied for the benefit of Mrs. MacLeroth and her children. The first part of the will shews, the testator intended it for their benefit *in some shape or other. They are first pointed out; and the word "children" having occurred in the beginning of the will, it is impossible, that any other construction can be given to the word "family." That is also the common acceptation of the word. The husband is never treated as part of his wife's family; though she is considered part of his. But we are relieved from that difficulty by the previous use of the word "children;" and from the first part of the will it is clear, the testator did not intend the husband should have any benefit from this fund.

Mr. Graham, in reply :

* * * As to the appointment executed by the plaintiff, the word "family" has various significations. The distinction attempted, that the husband is not part of the wife's family, though the converse holds, can never be maintained. He is the very essence and corner-stone of the family. The word "or" in this will marks the alternative. As it was competent to Rolfe to consider, that it was for the benefit of the family to prevent MacLeroth from going to gaol for this debt, his daughter had the same latitude.

MASTER OF THE ROLLS [after holding that Rolfe's will did not operate as an appointment of Mrs. MacLeroth's legacy, continued as follows:]

[166] The only remaining question is, whether Mrs. MacLeroth has well disposed of it in the alternative, that her father has not. My inclination is in favour of what she has done. I do not like to criticise upon the word "family." In some circumstances her husband may be considered as part of her family: but it is extraordinary, if the testator meant, that she should make a present of it to her husband. He has not said, she may dispose of it in such manner as may be of benefit to her, her husband, and family. I must consider a little more of that point, being clear upon the others; that Rolfe has made no appointment; and I am very sorry, that it must be considered

that MacLeroth's bond is an existing debt to be enforced against him. Whether he will be enabled to deduct that under this appointment of his wife, I shall take more time to consider.

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BACON.

MASTER OF THE ROLLS :

Dec. 24.

I have had some doubt upon this point; and I am only anxious that the decree shall not be supposed to be a determination, that, wherever a legacy is given to trustees, in trust, for instance, for a *fême covert* and her family, it is to be understood, that the trustees would be authorised to advance to the husband any gross part of that capital; for the construction of such a legacy, unaccompanied by any other circumstances, would be, that it should be applied for her and her children; and I desire to have it understood, that I by no means give it as my opinion, that the application of that money for the use of the husband would be within the trust. But the question in this cause depends entirely upon the meaning of the whole will as to the word "family," as there used; and upon the whole will I am satisfied I am fulfilling the intention of the testator by the declaration I shall make. There is a clear intention, either that this legacy shall be settled upon her and her children, to be limited to her separate use, and as a provision for her and her children, and if that part of the will had taken place, no doubt, the husband could have taken no share, or in the alternative; for if that provision *does not please Rolfe, the testator gives him

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leave to substitute another "the whole or any part of it to be paid and applied for the benefit of his said daughter and her family:" even there it might be said to mean the same as "children" before meant: but he adds, "either immediately or at any future period or periods of time, as the said William Rolfe shall think will, all circumstances considered, be most useful and beneficial to her and her family," &c.

Upon this it is clear, he meant either that Rolfe might settle it upon her and her children after her, and if she had any then, they were very young, so that nothing could be then applied for their benefit, or that he was to have the power to advance any part or the whole, either immediately, or in any way he should

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think under all the circumstances most beneficial for her and her family. He might, I think, have advanced part to set up the husband in trade. The testator, I think, meant, he should have that power ; and the word " family " as here used, was meant in a more extensive sense than children ; for he had first provided for giving it to her and her children ; and then the subsequent direction is to apply it, not for her and her children, but for her and her family : and then if he does not think fit to make such direction, it is to be applied in such manner as Mrs. MacLeroth shall by any writing, &c. appoint for the benefit of her and her family. Though an appointment was intended, none was regularly made. Then it was for her to direct any part to be applied as she thought fit, not for the benefit of herself and her children, but herself and her family. The construction her father put upon it is the true construction, as the testator must have intended. Therefore desiring to be understood, that the word " family " would not include the husband, except from the context it must do so, I think, under these words it does include any means the father should think fit to advance the husband in the world ; and if he did not, it gave her power to apply it for any part of her family. The letter from the testator to Rolfe, telling what he intended to do, and desiring him to leave directions how he wishes the legacy to be applied, shews, the power is very large. The appointment made by Rolfe, prior to the death of Lloyd, I have determined to be totally void to any purpose with reference to the will, that afterwards took place ; and the attempt by the codicil of 1795 *to dispose of part was put an end to entirely by the act of receiving from the executors of Lloyd the money, and having power to dispose of it, as he thought fit. But it did not rest there ; for after that, I fear, not very accurately reverting to what he had done, he made another will revoking all former wills ; and the Spiritual Court have held that codicil revoked also ; and therefore have not granted probate of it ; and consequently I cannot read it. Then as there is an end of that codicil, and it must be laid out of the case, Rolfe died intestate as to this 1,000*l.*, with that fund in his hands ; and not having made any due application of it, I am of opinion, he had at his death that sum in his hands subject to the trust ; and his

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executors are bound to apply it according to the trusts of Lloyd's will, and as if Rolfe had never acted under it. In that event, being clearly of opinion, Rolfe had it in his power to buy a commission for the husband, to set him up in trade, or to do any act for the benefit of him, and her, and their children, and not having done so, the question is, what was her power. The will in creating her power does not go back to direct an application to her separate use and for the benefit of her and her children : but it is to be for the benefit of her and her family, either then, or at any future period. She might have bought a house to have set her husband up in trade, or have applied it in any way to conduce to the benefit, not only of herself and her children, but, as Rolfe might have done, for any part of her family. She has appointed 800*l.* for the benefit of her husband. If she might set him up in trade, she might give it to him to apply it.

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BACON.

Therefore, not without some doubt, but, I think, upon the true construction of this will, not wishing to have it understood, that in any other case differently circumstanced the word "family" shall be held to mean the husband, I am of opinion, the plaintiff Martha MacLeroth had full power to appoint this fund for the benefit of her husband; and the appointment she has executed must be declared valid.

SAYERS, EX PARTE.†

(5 Vesey, 169—173.)

1800.
Jan. 22.

LOUGH-
BOROUGH,
L.C.

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A. abroad commissions B. in London, to send him foreign coin; with particular directions as to the manner and times of sending it; and remits bills; which B. discounts; and, the coin required not being to be had in England, sends two remittances, not equal to the amount of A.'s bills, to Lisbon, for the purpose of procuring it: with directions, if it cannot be had, to return bills. The coin not being obtainable, bills, nearly to the amount of the remittance to Lisbon, not indorsed by the correspondent there, are returned; and, B. in the interval becoming bankrupt, are received by his assignees. A. was held entitled to follow those bills under the particular circumstances: the Lord Chancellor expressing much doubt, whether the same would hold in the case of a remittance to buy goods in the way of trade.

THE petitioner, paymaster of the forces in the island of Dominica, wrote to the house of Cheap & Laughnam in

† *In re Hallett's Estate* (1879) 13 Ch. D. 696, 716; 49 L. J. Ch. 416.

SAYERS,
Ex parte.

London to procure and send out to him foreign coin, half joes and dollars; with directions to send him to the amount of 5,000*l.* at one time, 5,000*l.* at another, and the same sum by every succeeding opportunity by the packet or otherwise. He soon afterwards inclosed them two bills upon the Paymaster General for 10,000*l.* and 6,000*l.* for which he desired them to give him credit; and he drew upon them for above 2,000*l.*

Cheap & Laughnam having discounted the bills received from the petitioner, and the coin required not being to be procured in England, remitted 5,600*l.* to Peter & Co. at Lisbon; with directions to purchase joes, and if they could not procure them, to return the money in good bills; and at the same time wrote to the petitioner, that they had made a remittance to Lisbon for the purpose of procuring the coin. About a month afterwards Cheap & Laughnam made another remittance to Lisbon to the same amount; with directions to send joes and dollars, or, if they were not to be procured, good bills; but soon afterwards they countermanded the order as to the dollars; desiring only joes. The answer from Lisbon was, that it was impossible to procure joes; and that at all events they could not send more than half in coin; being obliged by a regulation of Government to take part in Government paper. Soon afterwards they sent good bills, but not indorsed by them, for very near the amount of the remittance. In the interval Cheap & Laughnam having become bankrupts, those bills got into the hands of their assignees.

The petition claimed these bills as the specific property of the petitioner.

The Solicitor-General, in support of the petition :

[*170] It is not necessary to shew, that the identical bank-notes and guineas, for which the bankrupts discounted the bills, were remitted to Lisbon, and produced *the bills in question. If the foreign coin had arrived in England after the bankruptcy, it would have belonged to the petitioner. Then are not these bills in just the same situation? The difference in the amount of the return from Lisbon probably proceeded from the exchange.

The *Attorney-General* and *Mr. Mansfield*, for the assignees under the Commission :

SAYERS,
Ex parte.

If the bills remitted to London by the petitioner had remained in the possession of the bankrupts at the time of the bankruptcy, they would have had them upon a specific trust ; which would have bound the assignees. But that is not the state of this case ; for previously to the bankruptcy they had discounted those bills ; then they remit 5,600*l.* to Lisbon in bills, which they purchased in London. They do that out of the general cash of the house. It may be what they receive for the discount of those bills : but the moment they were discounted, and the produce came to the hands of the bankrupts, their situation was, that they were debtors to the petitioner for the sum received for them ; and then he could only prove under the commission in respect of that. Then has any thing been done, constituting that fund a specific property, that did not pass by the assignment, but was the petitioner's property in the hands of the bankrupts under a trust ? Suppose, the bills remitted to Lisbon had been bad : how would they have been the petitioner's loss ? If the joes had been actually purchased, being purchased for the petitioner those specific joes might have been his property. So they might have been, if the bankrupts had not a shilling of the petitioner's in their hands ; but the joes not being purchased, but bills being remitted to the bankrupts in consequence of the remittance by them to Lisbon, what can give the petitioner a greater lien upon those bills and that sum of 5,600*l.*, part of the produce of the bills discounted, than the rest of those bills. The remittance to Lisbon did not alter the property at all. The fund remained the property of the bankrupts just as before. Suppose a general debt ; that upon a balance of accounts the bankrupts had been indebted to the petitioner in 10,000*l.* ; and he had desired them to purchase joes ; and then this transaction had taken place : Could he claim a lien upon the bills returned ? What is the difference ? The bills remitted for a particular purpose they have converted into a general debt ; and then this transaction took place. The principle applies to cases, *where specific effects come to the hands of the assignees ; which must be subject to the trusts upon which the bankrupts held them :

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SAYERS,
Ex parte.

but a debt due from the bankrupts cannot be considered as held upon a trust. They are debtors; and responsible as such, if they do not do what was required. There would be no end of such liens, if all sums remitted to traders are to be pursued through every possible transaction. It would go to a great extent. It might as well be contended against a banker, who had received a sum of money from a particular customer to keep. It is an unfortunate case, where a person has sold goods to the bankrupt; who receives money for them; but there is no pretence in that case for a lien. In the bankruptcy of Cox & Heisch a person had engaged with them in an adventure by a remittance to St. Petersburg; in which his interest was one-fourth. Upon a remittance of bills from St. Petersburg on that account Cox & Heisch discounted them; and, knowing they were responsible for one-fourth, they put aside a sum, rather more than that; meaning to pay it to that person: but upon a considerable bankruptcy in the mean time finding they must fail they suspended the actual payment: but the sum appropriated was clearly distinguishable in bank notes. Upon petition for these notes and some others, which were clearly specific, your Lordship thought the petitioner entitled to the latter, but not to the notes, which it was the intention of the bankrupts to pay to him in respect of his fourth of the adventure: but they were considered mere debtors to him for that sum. So in this case, when the bills were discounted, they became debtors to the petitioner for the money received upon them; and nothing, that passed afterwards, can make any bills, particularly these bills, the specific property of the petitioner. If the bills they got had proved bad, they must have taken the consequence. Whether they had a right to charge him with any loss by interest, &c. in the course of exchange, is a different question. If without any remittance he had directed them to make the purchase, and they had tried, but could not, they might perhaps have a right to charge him with the expense: but he would not be responsible for the goodness of the bills. Besides, the remittance by the petitioner was not upon a special trust, but remitted upon his general account. He desires them to give him credit for the bills; and he draws upon them. That

money was not distinguished in their hands from any of their other money ; and it was indifferent, with what money or bills the joes were bought. There was no appropriation.

SAYERS,
Ex parte.

LORD CHANCELLOR :

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It strikes me, that the case of a lien is very distinguishable from the case cited of the Russian adventure ; in which there never was any severance from the general property of the bankrupts.

I take it to be clear upon the correspondence in this case, that the money was sent for a particular purpose ; for the purpose of procuring foreign coin. The first letter distinctly marks the order to send 5,000*l.* at one time, 5,000*l.* at another, and the same sum by every opportunity by the packet or otherwise. He remits bills upon the Paymaster General. Then what is done ? The order not being to be executed in London, they proceed to execute the trust by sending to Lisbon, perhaps out of the very money received upon those bills, but out of their funds, having received the bills, for the purpose, it is expressly declared in their correspondence, of making the purchase. It is admitted, very properly, that if joes had been returned, the petitioner would have a right to them, as purchased by his order with money remitted by him for that purpose. It does not remain a general debt ; they proceeding to execute the trust by doing all, that was in their power. The thing was not to be bought here. They send to Lisbon. Suppose, the petitioner had gone to Lisbon : he might have stopped the execution of the commission ; saying, he did not want the foreign coin, but would take it in bills or any other way. Suppose, it could have been done by the purchase of joes, but Peter & Co. had purchased some other coin : the petitioner might have affirmed or dis-affirmed it. But what has happened ? Joes not being to be found these bills are sent. The petitioner might, if he had gone to London, have gone to them, and said, he would take the bills. It would be a narrow rule to hold, that, the commission being in train to be executed, the property, being separated and severed property by the accident that the joes were not bought, should be lost to the owner. I am inclined

SAYERS,
Ex parte.

therefore to allow the lien in this case, and to direct the assignees to deliver over the bills. It is a particular case; and different from any, that has occurred.

For the Assignees :

It is a very important point. The money got into the general fund. Suppose money had been sent for the purpose of buying goods.

[173] LORD CHANCELLOR :

I doubt much, whether it would apply to that case of buying goods. There is a great deal of traffic and exchange there.

I feel, there is a considerable degree of singularity in this case; and if you wish it, I will consider farther of it. It is a very hard case. It is very fit for the consideration of the creditors too; for it is clear, the fund is increased by this sum of 16,000*l*. If it got into the general fund, it got out again. It acquires an identity and a distinction from all the rest of the fund by the application of it, by sending it to Portugal.

The bills having been paid, the order was made for payment of the money to the petitioner: the point not being farther pressed by the assignees.

1800.
Jan. 31.

LOUGH-
BOROUGH,
L.C.

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SMITH *v.* SMITH.

(5 Vesey, 189—194.)

Property bought in the name of a partner with money belonging to the firm, held to be the separate estate of the partner, the purchase money with interest having been charged to the partner's account with the firm.

* * * IN June, 1789, Robert Smith, who was a brewer at Croydon, took his brother Charles Smith into partnership with him; and in the course of that partnership at several times down to the 6th of October, 1791, Robert Smith purchased freehold and copyhold estates at Croydon, Merton, and Woddon, in Surrey; and was seised of the legal estate of the said freehold premises in fee, except one, purchased upon the 29th of January, 1791, which was conveyed to him and a trustee, to bar dower,

and of the copyhold premises according to the custom of the manor. He was also seised of other freehold estates by inheritance, or by purchases previous to the partnership.

SMITH
v.
SMITH.

The estates purchased consisted of a brew-house and premises and some public houses, for the purposes of the trade. When the partnership was formed, it was agreed, that Robert Smith's debts were to be considered as his separate debts: but the interest was to be paid out of the partnership property. It was also agreed, that the freehold and copyhold estates, of which he was then seised, should continue his separate property: but the rents of *those estates, which consisted of public-houses, and also of the estates purchased in his name and to be considered as his separate property, were carried to the partnership account; and the partnership allowed him interest, at first at the rate of 5 per cent., and afterwards of 4 per cent., upon the estimated value of the estates, of which Robert Smith was seised before the partnership, and upon the purchase-money of those, which were purchased. As these purchases were made, Robert Smith drew the money from the partnership; and his account was debited with the amount and interest. During the partnership many of the private debts of Robert Smith were paid off, and many new debts contracted upon his separate notes: the debts paid and the interest of those new debts were paid with the partnership money; for neither of which was Robert Smith charged in the partnership accounts: but in their annual settlements all the debts, as well as those contracted by the trade as those secured by Robert's private notes, were entered under the head of debts at the brew-house.

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In 1797 a joint commission of bankruptcy issued against him and his brother; under which the freehold and copyhold estates and also certain leasehold estates were sold by the assignees for 8,500*l*. Upon that occasion an agreement, dated the 23rd of July, 1798, took place between Elizabeth Smith, [the wife of the said Robert Smith,] and the assignees; reciting the bankruptcy, sale, &c.; and that Elizabeth Smith claimed to be entitled to dower out of said messuages, &c. or some of them; and that it had been required by the purchasers, that she should execute a release, and levy a fine; and that to induce her so to do the

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v.
SMITH.

assignees had proposed, that out of the money arising from the sale she, her executors, &c. should receive the sum of 330*l.* in full satisfaction and discharge of her dower of and in the same premises, in case the whole shall be found subject to her dower; and so in proportion for such parts thereof as shall be found subject to such dower, as aforesaid, to which she had agreed, it was witnessed, &c. and she joined in the fine, accordingly.

The bill was filed by Robert Smith and his wife, against the assignees under the commission; praying, that they may be decreed specifically to perform the agreement, and to pay the sum of 330*l.*, or such part thereof as the Court shall think the plaintiff Elizabeth entitled to.

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The defendants by their answer submitted, that the plaintiff Elizabeth would not upon the event of her surviving her husband be entitled to dower; inasmuch as she was barred to claim dower by her marriage settlement; and also, because part of the estates, as to which Robert Smith was seised of the legal estate in fee, was not purchased with his own money, but with the partnership money, and for the use of the partnership; for whom he was a bare trustee.

[The Court held that the plaintiff Elizabeth's claim to dower was not barred by her marriage settlement.]

The *Attorney-General*, and *Mr. Cooke*, for the plaintiff :

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* * * By the agreement between the parties the estates purchased were conveyed to Robert Smith; and though the purchase-money was paid out of the partnership funds, he was to be made debtor for those sums. From the nature of the transaction therefore the estates were his; and he was debtor to the partnership for the sums paid for them: but that will not affect her legal title to dower.

Mr. Richards and *Mr. W. Agar*, for the defendants :

* * It is admitted, that the partnership funds were employed in purchasing these estates; and then they are as much part of the partnership stock as any other. A decision, that the wife is dowerable out of these estates will be a precedent for fraud by

enabling a partner upon an apprehension of bankruptcy to provide for his wife at the expense of his creditors.

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v.
SMITH.

LORD CHANCELLOR :

If these estates had only been conveyed to one partner, having been purchased with the partnership funds, they would have been part of the partnership property. But that was not the nature of the transaction. The distinction is, the agreement as to the purchase of these houses was specific. Upon that they never could be specifically divided, as if they were part of the partnership stock : but when they came to settle, the houses were Robert Smith's, and he was debtor for so much money. The whole turns upon that. I take it as a fact agreed, that upon that agreement, if the partnership had been dissolved, the estates would have remained with Robert Smith, and, whether they were worth so much, or not, he would have been debtor for the money. If he had sold one of these houses, his sale would have been good, even with notice of their manner of dealing and their transactions, if the fact is true as to the agreement ; and no person would have *taken the title without the wife joining. The single question is, whether I could have compelled her to levy the fine. I think, she is entitled to dower out of the estates. She must be paid ; or they must have sold the estates subject to her dower. It seems to me, she is entitled to the whole.

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From a note to GREENWELL v. GREENWELL, 5 Vesey, 194—199.

CAVENDISH v. MERCER.

(5 Vesey, 195 n.—197 n.)

Residuary bequest to a very large amount in favour of infant grandchildren, payable at twenty-one or marriage, with survivorship, the interest to accumulate and be paid with the capital ; and in case of the death of all before the time of payment, over to their mother absolutely. The father's income, though considerable, bearing no proportion to the fortune bequeathed, and there being several children, the Court directed maintenance, taking the consent of the mother.

RICHARD BRADSHAW, Esq. by his will, dated the 28th of March, 1778, gave to the separate use of his only child Sarah, wife of

1800.
Jan. 27.
Feb. 3.
—
LOUGH-
BOROUGH,
L.C.
1776.
March 9.
—
BATHURST,
L.C.
[195 n.]

CAVENDISH
v.
MERCER.

[*196 n.]

the defendant Henry Cavendish, an annuity of 400*l.* to be secured by an appropriation of a sufficient part of his personal estate. He then gave 10,000*l.* to his executors, upon trust to be placed out at interest, and paid to such one or more child or children of the defendant Sarah Cavendish at twenty-one years of age, as she should appoint; and in the mean time he directed his executors * to receive all the interest of the said 10,000*l.*, and place out the same from time to time to accumulate, and to stand possessed of such accumulation in trust for such children as should be entitled to the 10,000*l.*, and in the same shares; and in case his daughter should make no appointment, the said 10,000*l.* and the accumulation to sink into the residue of his personalty. He gave to his son-in-law Henry Cavendish 1,000*l.*; to his grandson the plaintiff Richard Cavendish, 8,000*l.*; and to his grandson the plaintiff George Cavendish, 8,000*l.*: such legacies to his grandsons to be paid at twenty-one, but without any interest in the mean time: and in case of death under that age to sink into the residue. He gave to his three granddaughters, the plaintiffs Catherine, Deborah, and Sarah Cavendish 10,000*l.* each, and to his grand-daughter Theresa Maria Cavendish 8,000*l.*, to be paid at twenty-one, or marriage with consent of their mother or guardians, and not otherwise; but without any interest in the mean time; and in case of death, or marriage without consent, to sink into the residue; and after giving several pecuniary legacies he bequeathed the residue of his personal estate upon trust to place it out at interest to accumulate, and to make over all the funds and accumulations unto his grandson, the plaintiff Augustus Cavendish, upon attaining twenty-one; but in case he should die under that age, then upon trust for his grandsons, the plaintiffs Richard and George Cavendish, equally, share and share alike, at their respective ages of twenty-one; but if either should die under that age, in trust for the survivor: in case of the death of all three grandsons, in trust for his grand-daughters at twenty-one, or marriage with consent, as aforesaid. In case all his said grand-children should happen to die before the times appointed for their enjoying such funds and securities, to be purchased with such residue, as aforesaid, together with such accumulated

funds and interest, then he gave the same unto his said daughter, the defendant Sarah Cavendish, her executors, &c. for ever ; and in the mean time and until his said grand-children or some or one of them should become entitled to the said funds by virtue of his will, upon trust to receive all the dividends and interest, which should arise from the funds to be purchased with the residue aforesaid, and invest the same from time to time at interest to accumulate, and stand possessed *of the accumulation in trust for the person or persons, who should be entitled to the funds to be purchased with the residue.

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MERCER.

[*197*.]

The defendant Henry Cavendish, and Sarah his wife, by their answer stated, that the said Henry Cavendish took out administration with the will annexed ; that they were desirous, that the whole or part of the interest of the said legacies should be applied in the maintenance of the plaintiffs ; inasmuch as the defendants had a large family of children, consisting of the plaintiffs and one other child, born since ; for whom no provision was made by the said will ; and the net annual income of the defendant's estate was 1,100*l.* a-year, exclusive of an annuity of 700*l.* a-year ; which his father paid him, so long as his father enjoyed a place under the Crown ; and therefore the said defendant could not maintain the plaintiffs in proportion to their fortunes.

The LORD CHANCELLOR made the usual decree for taking the accounts ; and ordered, that the Master should, in case the defendant Mrs. Cavendish should appear before him separate from her husband, and consent thereto, inquire into the circumstances of the defendant Henry Cavendish ; and whether it was proper to make any and what allowance for the maintenance and education of the plaintiffs, the infants, and state the same with his opinion thereon to the Court.

The Master by his report, dated the 18th of November, 1776, stated, that it would be proper to allow certain sums therein for the maintenance ; and that report was afterwards confirmed.

[*Note*.—This case was followed by Lord LOUGHBOROUGH, L.C. in *Greenwell v. Greenwell* (1800) 5 Ves. 194 ; no further report of that case appears necessary.]

1799.

Dec. 24.

1800.

Feb. 4.

Rolls Court.

ARDEN, M.R.

[207]

HARRISON *v.* FOREMAN.†

(5 Vesey, 207—210.)

A clear vested interest not divested: the express contingency, upon which it was to be divested, not having happened.

Bequest to A. for life, and after her decease to B. and C. in equal moieties; and in case of the decease of either in the life of A. the whole to the survivor of them living at her decease. B. and C. having both died in A.'s lifetime.

Held, the divesting clause had no operation.

JOHN STALLARD, being possessed among other personal estate of 566*l.* annuities of 1778, by his will, dated the 19th of August, 1779, gave to Joseph Jennings and John Harrison 40*l.* per annum, part of the said annuities, in trust to pay the dividends and produce thereof, which should from time to time arise and become payable, to his cousin Mrs. Sarah Barnes during her life, exclusive of her marriage or any future husband, and not to be subject to his or their debts or control; and from and after her decease upon trust to transfer the said sum of 40*l.* per annum, or the stock or fund, wherein the produce thereof might be invested, to Peter Stallard and Susannah Snell Stallard, children of his (the testator's) cousin William Stallard, in equal moieties; and in case of the decease of either of them in the life-time of the said Sarah Barnes then he gave the whole thereof to the survivor of them living at her decease. He gave all the residue of his estate and effects of every kind to Elizabeth Stallard and Sarah Stallard, the children of his cousin Abraham Stallard, to be equally divided between them, share and share alike; and he appointed Jennings and Harrison his executors.

By a codicil, dated the 2nd of February, 1781, among other things the testator revoked the disposition of the residue, and gave it in the same terms to the said Elizabeth Stallard and Sarah Stallard, and Mary Main, sen. and Mary Main, jun. equally.

By another codicil, dated 9th February, 1782, the testator taking notice of the death of Jennings appointed another joint-executor with Harrison.

The testator died in March, 1782. Susannah Snell Stallard

† *Marriott v. Abell* (1869) L. R. 7 Eq. 478; 38 L. J. Ch. 451.

and Peter Stallard died; the former in January, 1784: the latter in December in the same year; both intestate. Sarah Barnes died in January, 1797. The bill was filed by the executors of the testator; praying, that it may be declared, who are entitled to the said 40*l.* per annum Annuities, &c. The question was between the defendant Foreman, administratrix of Susannah Snell Stallard and Peter Stallard, and the residuary legatees, claiming it as having fallen into the residue.

HARRISON
v.
FOREMAN.

Mr. Hood,† for the defendant Foreman, contended, that Susannah Snell Stallard and Peter Stallard were joint-tenants of the capital of the fund, subject to the life interest of Sarah Barnes: but the MASTER OF THE ROLLS intimated a decided opinion, that they were tenants in common.

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It was then contended for the same defendant, that, each of them having a vested interest in a moiety, it passed to their respective personal representatives; the event, upon which the legacy was given over to the survivor of them living at the decease of Sarah Barnes, not having happened; both having died during her life.

The cases cited were *Barnes v. Allen*; † *Monkhouse v. Holme*; § *Benyon v. Maddison*; || and *Scurfield v. Howes*.¶

Mr. Stanley, for the residuary legatees:

Those cases do not apply; and there is no case like this. Taking the whole sentence in the will, relating to this legacy, together, it is clear, the testator intended a personal benefit to Susannah Snell Stallard and Peter Stallard; and that neither should take any benefit, unless surviving Sarah Barnes; during whose life nothing vested, but their right was merely contingent. As she survived them both, the legacy upon her death lapsed, and fell into the general residue.

MASTER OF THE ROLLS:

The only question upon this will is, whether by the event that

† The arguments *ex relatione*.

|| 2 Br. C. C. 75.

‡ 1 Br. C. C. 181.

¶ 3 Br. C. C. 91.

§ 1 Br. C. C. 298.

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has happened, the deaths of Susannah Snell Stallard and Peter Stallard in the lifetime of Sarah Barnes, this sum of 40*l.* per annum annuities given after her death in their favour is undisposed of ; or in other words whether the bequest is by these means put an end to and become absolutely void. Upon the first part of the will, if it stood without the condition annexed in case of the death of either of them in the lifetime of Sarah Barnes, there could be no doubt, I suppose, that it would have been a vested interest in those two persons ; for it is a bequest of these annuities to a person during her life ; and after her decease to two given persons in equal moieties. If it rested upon those words, there could be no *doubt it would upon the death of that person have been a vested interest in them as tenants in common, transmissible to their representatives, whether they survived the person entitled for life, or died before her. Then comes the condition annexed ; making a disposition in a given event different from that, which would have been the effect of the first words. The contingency described in that part of the will never took place ; there being no survivor of those two persons at that time. The question is then, whether this makes the whole void ; as if it never vested at all.

It is perfectly clear, that where there are clear words of gift, giving a vested interest to parties, the Court will never permit that absolute gift to be defeated, unless it is perfectly clear, that the very case has happened, in which it is declared, that interest shall not arise. The case of *Mackell v. Winter*† is most analogous to this. I held the interest absolutely vested in the surviving grandson. My decree was reversed : the LORD CHANCELLOR holding two things ; in both of which I had given an opinion ; first, that it never did vest in the two grandsons or the survivor of them : 2dly, If it did vest, yet it sufficiently appeared upon the will, that the testator intended a survivorship to take place between all three, the grandsons and the grand-daughter, though it was not expressed. As to the first point, it does not bear upon this case. The LORD CHANCELLOR was of opinion, the words were not sufficient to give a vested interest to the two grandsons for this reason ; that nothing was given to them till their ages of twenty-one : but the capital and the accumulation are directed to

† See the note at the end of this case.

be paid to them at that time and no other. His Lordship's opinion is expressly founded upon that. My opinion rested entirely upon the first point. I admit the absurdity of the intention: but that is no reason, why it should not prevail. I am very glad, the decree took the turn it did; for unquestionably it effected the real intention of the testatrix.

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FOREMAN.

But without entering into that question, or commenting farther upon that case, to which it is my duty to submit, it is sufficient to say, that it is impossible any doubt can be entertained upon the *words of this will. Upon the principle of the LORD CHANCELLOR's opinion, that the words in that will were not sufficient to give any vested interest till the attainment of majority, my decree undoubtedly was wrong. But upon the doctrine held both by his Lordship and by me it must be determined, that upon the words of this will there was a vested interest, that was to be divested only upon a given contingency, and the question only is, whether that contingency has happened. No words can be more clear for a vested interest. Then the rule, that I applied in *Mackell v. Winter*, and that was admitted by the LORD CHANCELLOR, takes place; that if there is a clear vested interest, the Court is only to see, what there is to take it away; and the only contingency is, that in case of the decease of either of them in the life of Mrs. Barnes the whole is to go to the survivor. Neither of them was living at her death. That rule, therefore, that I applied in *Mackell v. Winter*, and that I still think binding upon a court of equity, applies. There is a vested interest; and the contingency, upon which it is to be divested, never happened: the vested interest therefore remains; as if that contingency had never been annexed to it. Upon the principles laid down by the LORD CHANCELLOR in *Mackell v. Winter* I am perfectly clear, his Lordship would have agreed with me in this case. I could illustrate the principle by putting the case of a real estate, instead of these annuities, given after the death of the tenant for life to these two persons and their heirs, as tenants in common; but, if either of them dies before the death of the tenant for life, then to the survivor and his heirs. Putting it so, there is no possibility of doubt, it would have been a vested interest in them, to be divested upon a contingency, which did not take place.

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v.
FOREMAN. Declare, that these annuities of 40*l.* per ann. were a vested interest in Susannah Snell Stallard and Peter Stallard, and now belong to the defendants Foreman and his wife in right of the latter as their administratrix.

Note.—The actual decision in *Mackell v. Winter* (3 Vesey, 296, 536) above referred to, which is fully stated and strongly questioned in Jarman on Wills, Ch. XLIII., turned upon the doubtful construction of a very special and inaccurate will, and is omitted from the Revised Reports as of not sufficient general interest to require a report.—O. A. S.

1798.
June 15, 18,
21, 26.

*In the House
of Lords.*

[266 n.]

JONES v. MARTIN.

(5 Vesey, 266 n.—270 n.)

Covenant by a father to give or leave by his will all his personal estate equally among his children does not deprive him of the right of unlimited expense, and of any fair application, even by gift, if absolute, and *bond fide*: but a disposition for the purpose of defeating the covenant cannot stand: therefore transfers of stock to one of the children by the father were upon the circumstance of a reservation of the dividends for his life and other evidence of a partial intention, to elude the covenant, set aside.

By articles executed upon the marriage of Mr. and Mrs. Jones in 1767, T. Martin, the father of Mrs. Jones, covenanted to leave her upon his death certain tenements; and that he would at his decease by his will give and leave her a full and equal share with her brother and sister of all the personal estate of him, the said T. Martin, to be had, held, and enjoyed, immediately after the decease of himself and his wife, and not before. He also covenanted to pay them 100*l.* a year during the lives of himself and his wife.

Similar covenants were entered into by the father of Mr. Jones; but he died in 1770 insolvent, and his real estates mortgaged beyond their value; and his son and daughter-in-law never derived any benefit from his covenants.

The sister of Mrs. Jones died without issue in 1779; and her mother Mrs. Martin died in 1715. At the date of the articles Martin, the father, possessed considerable property, real and personal: the greater part of his real estate consisting of freehold premises, malting and fishing houses at Yarmouth, used for the purposes of his trade; which he discontinued in 1774; at

which time it was evidently a losing concern. He also enjoyed a place of considerable profit. In the period from 1769 to 1786 he sold all his real estates; and invested the produce together with his personal estate in Bank Stock. Four-fifths of the real estate had been so disposed of before 1775. In July, 1783 he laid a case before Lord KENYON, then at the bar; who gave an opinion, that Mr. Martin was not restrained by the covenant from investing any part of his personal property in real estate in his life, or giving away any part of his personal estate; provided the gift were absolute, and to take effect in his life-time. Immediately afterwards Martin transferred into the name of his son 3,000*l.* Bank Stock, and afterwards, down to 1788, other sums, to the amount, with the first transfer, of 4,448*l.* Bank Stock: the son verbally promising to pay his father the dividends during his life. The money, with which the Bank Stock was purchased, was in the whole 5,735*l.*; of which 3,072*l.* was produced by the real estate, and 2,663*l.* was personal property. Both Mr. and Mrs. Jones and Martin, the son, had at various times received money from Martin, the father: but the sums so received by Martin, the son, considerably exceeded those given to Mr. and Mrs. Jones. The value of the Bank Stock transferred, which was produced by the personal estate, was nearly equal to the benefit received by Mrs. Jones from her father under the articles and otherwise, independent of what she would be entitled to at his death; and it appeared, that he considered that part of the stock transferred to his son as an equivalent for such benefit received by his daughter.

In 1788, after all the stock had been transferred to the son, another case was submitted to Lord ELDON, then at the bar; who upon the whole inclined to think, the transfers to the son could not be set aside as a fraud upon the marriage articles; but considered the case as very doubtful.

In 1789 Martin, the son, sold out the Bank Stock for 8,050*l.*; which he invested in India Stock. This was done without the privity of his father; and the son continued to pay him the amount of the dividends of the Bank Stock; which were less than the dividends of the India Stock purchased.

In 1792 Martin, the father, died, at the age of ninety. By his

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v.
MARTIN.
[*267]

will, made in 1786, reciting the articles, as far as they related to the real estates, he devised them to the uses of *the articles ; and reciting the provision in the articles relating to his personal estate, and the death of his youngest daughter, in performance of his covenant he left all the personal estate he should die possessed of, subject to his debts, &c. in effect to be equally divided between his son and daughter.

The personal estate remaining to be divided under the will amounting only to 90*l.*, the bill was filed by Mr. and Mrs. Jones against her brother ; praying an account and an equal distribution of the Stock, that had been transferred to the defendant, and of all the property received by him in the life of his father, as being a fraud upon the marriage articles. The answer insisted on the transfers, as a *bonâ fide* gift to the defendant.

For the plaintiffs several letters were produced from the defendant to his broker. By the two first letters, dated the 2nd and 3rd of August, 1783, it appeared, that the father had directed, that the transfers should be made to the son's name, and that the dividends were to be paid to the father and mother during their lives and the life of the survivor. In the letter, dated the 3rd of August, 1783, the defendant expresses himself thus :

“ I signify again, that the interest of the whole 3,000*l.* is to be remitted by my desire to my father and mother during their lives, as often as it shall become due.”

In another letter, dated the 16th of June, 1785, the defendant says, “ You will please to remit, as usual, to my father the dividends due upon the Stock transferred to me.”

In a letter, dated the 10th of February, 1786, the defendant confidentially asks the opinion of the broker, in this way : “ Concerning the stock, which now stands in my name. I presume, nothing more is requisite towards ascertaining it to be my legal property. To be more explicit, I beg to know, whether it be necessary, I should personally accept the stock by signing the books before my father's death. He wishes to avoid giving any room for dispute : and therefore hopes, that the mode of receiving the dividends of my stock will not affect my right in it.”

In the same letter the defendant asks, whether the placing the

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dividends of his stock, as they become due, to his father's account will not wear the appearance of his having an interest in the stock, and create doubt of the defendant's right to it after his father's decease; declaring the truth in confidence; that his father has transferred his stock to him in his life; which he had a power of doing, but could not do it by his will. The letter then proceeds to put the question, whether "the dividends of my stock being placed to his account, although he receives them by my consent, will any way affect my right in the stock. I should imagine, that in virtue of the letter of attorney I sent you to purchase stock and receive the dividends you do it in my name, and therefore it is immaterial, whether you remit them to me or to any other person at my request."

By another letter to the broker, dated the 25th of April, 1788, the defendant acknowledges the receipt of a letter, "informing me of your having transferred 800*l.* Bank Stock from my father's account into my name." He also acknowledges the sum total "now in my name 4,448*l.*;" and he directs the interest to be remitted to his father during his life.

By another letter, dated the 12th of December, 1789, the defendant desires the broker to remit the dividends to him; as it will make no difference to his father; and he asks the price of Bank Stock at the time of the several transfers to him.

Letters from Martin, the father, to the same broker were also produced. In one of these letters, written in 1788, Martin, the father, desiring the broker to enter the money remaining in his name in the name of his son uses this expression: "so that what money I have in the bank is in my son's name."

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In another letter, dated the 24th of April, 1788, he says, "I have received your favour; advising, you had advised my son, that the 800*l.* of mine was turned over in his name, and the interest mine so long as I live."

There was evidence of frequent declarations by the father, that he had transferred the stock to the defendant; reserving only the dividends for his own life.

The imputation of influence was supported by several mysterious letters from the father to his daughter and son-in-law, and ambiguous expressions in conversation, and two state-

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ments in writing, admitted to have been prepared by the defendant; in which his father justifies what he had done; declaring, that he considered himself at liberty under the articles to give to his son any part of his property during his life; and that he had always intended, that the real estate or the produce of it should go to him.

The appeal of the plaintiffs from the decree of the Court of Exchequer was argued at the Bar of the House of Lords on the 15th, the 18th, and the 21st of June, 1798. On the 26th of June, the LORD CHANCELLOR spoke to the following effect:

The consequences would be bad, if this decree was to pass into a precedent: but I shall determine without particular regard to general consequences. I will take the case on its own circumstances. Cases in equity on such subjects as the present do not often govern each other: they rest for the most part on the facts of each particular case.

This covenant was stated by the counsel for the respondent to be vague and idle, unmeaning and insecure. It is not however an unusual covenant in settlements. Many marriages are entered into on such covenants: and they are not inexpedient. They are entitled to favourable consideration. Such a covenant holds out a prospect, that the party, who marries into a family, shall continue a member of that family; and it provides, as it were, a pledge, that he shall be considered, and may consider himself, part of such family till the death of the person who enters into the covenant. But then it does not confine or restrict the father's powers. He may alter the nature of his property from personal to real; or he may give scope to projects; or indulge in a free and unlimited expense. But he must not be allowed to entertain more partial inclinations and dispositions towards one child before another. If his partiality does rise so high, and he will make a difference, he must do it directly, absolutely, and by an unqualified gift, surrendering all his own right and interest. He must give out and out. He must not, however, exercise his power by an act, which is to take effect, not against his own interest, but only at a time, when his own interest will cease.

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The failure of the appellant's father in his engagements might reasonably pique the respondent's father. But that is not a sufficient reason or excuse for what he has done. Indeed it has nothing to do with this case.

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The greater part of the real property, which belonged to the respondent's father, was for the purpose of carrying on trade, which he had long been engaged in. He moreover enjoyed a place of considerable profit. When he sold off the malting and fishing houses, he performed an act of economy. When he ceased to trade, it was bad property. He could only let them, instead of using them for traffic. Accordingly he sold them piece-meal; as opportunity offered.

In 1783 sentiments not favourable to the appellants entered into the old gentleman's mind; I do not pretend to say, whether by suggestion or not; and he proceeded to carry certain intentions into execution: but still he continued in the enjoyment of all his property till the time of his death. After his death it appeared, that the clear residue of his personal estate amounted to 90*l.*; and the share of the appellants under the covenant was of course 45*l.* This naturally excited great surprise; and in the event produced the present bill and subsequent proceedings. It was soon discovered, that 4,675*l.* stood in the son's name in East India Stock; and it was traced to be the produce of 4,448*l.* Bank Stock; which had been sold out by the respondent in 1789, and invested by him in East India Stock. The Bank Stock had been transferred at different times from the father to the son. This transfer was not an absolute gift; for the father had the dividends, not of the East India Stock; for that transaction had been carefully kept back by the son from the father's knowledge; but the father received out of the dividends on the East India Stock a sum equal to what the dividend would have been in Bank Stock; and the respondent appropriated the surplus of the dividends to his own use. This change from Bank to East India Stock is admitted to have been clandestinely made by the son, and without the father's knowledge.

The transfers from the father to the son were not to put the son in the unqualified and absolute possession of the stock, but on certain terms and under certain trusts. These trusts were

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not however reduced to writing: nor were any means used to secure the father in the receipt of the dividends. Then the question is this: Has the Court any evidence by which it can trace, what was the trust, on which the transfers were made, and what was the real nature of the transaction; for it must not now be contended with me in the argument, that this was an absolute gift without any trust. Then what was the trust? I will refer your Lordships to the respondent's letters. One is dated the 2nd August, 1783: the next is the 3rd of August, the day after. This letter shews, that the father had given his own directions that the transfers should be made to the son's name, and that the dividends were to be paid to the father and the mother for their lives and the life of the survivor; and it is to be observed, that such was the provision of the covenant in the marriage articles. The letter of the 10th February, 1786, is a most material and remarkable one. In this letter your Lordships will observe a confidential disclosure made by the respondent to Mr. Newland, and a degree of consultation with him, for the purpose of learning what more could be done to secure the son, in what? What does the son himself call it? Not "my stock;" but his expression is, "the stock which stands in my name;" and he adds, "I presume nothing more is requisite towards ascertaining it to be my legal property;" and then he says, "in one of your letters, with which I was favoured, you signify, that you place the dividends of my stock, as they become due, to my father's account: now will not this wear the appearance of his having an interest in the stock?"

It is plain, that the respondent felt the transaction strongly and acutely; and that the suspicion, which he entertained as to the validity of what had been done, recoiled on his mind every moment. As an honest man he never could call this stock his own.

So again as to the father's letters. They do not say "given to my son:" no such thing: but "entered in my son's name;" and again, "what money I have in the bank is in my son's name." "The 300*l.* of mine turned over in his name and the interest mine so long as I live."

When this transaction is unmasked, the whole object appears to have been, that the stock should be found in the son's name

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at the father's death, to defeat the father's covenant in the apellant's marriage articles.

A great deal of reasoning and disguise is made use of in the declarations: but the whole scheme and intention of them apparently was to gloss over the transaction. The respondent had no right in equity to change the nature of the stock as he did. The private transfer was a breach of honour and confidence. The father did not mean to part with his property in his stock. Had he wanted any part of it in the course of his life, he might have called upon his son for what his wants required; who perhaps would not have been very well pleased with such a requisition.

The covenant did not prevent the father from giving the stock out and out: but if he chose to keep it, he kept it applicable to the general engagements he had entered into for his family. Lord CowPER said in the case of *Turner v. Jennings*,† that if the father was permitted to act according to the facts of that case, it would put an end to the custom of London. He was a great man; and to his Lordship's doctrine I declare my assent. So, of such a covenant as the present. Here also the property continued to answer all the father's own purposes during his life. If a father will be partial, and will give a preference, he must give against himself; and not make a mere reversionary gift. He should immediately feel himself so much the poorer for his gift. If he is willing to suffer that, let him then yield to the impulse of his partiality. But if a father may effectuate his purpose by anything short of this, it will furnish perpetual opportunity for subterfuge and scheme to defeat and disappoint these covenants; which ought to be most honourably observed.

If the son had become bankrupt, I rather think, his creditors might have taken the stock; for they might have said, as against the father, "you have allowed your son to appear as the owner of this property."

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If the father became bankrupt, his creditors would have had a clear case of it; and would have had no difficulty in obtaining the stock again. Suppose the son to have died in the father's lifetime: might not the father have called on the son's repre-

† 2 Vern. 612.

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sentatives for a transfer of this stock? He would have had no other evidence of the trust than the evidence present in this cause, coupled with the receipt of the dividend from time to time; which indeed would have been strong evidence. The father therefore must have made out this transfer to have been a transfer in trust for himself; and I think, that he would have reached that point in a court of equity.

Upon the whole I therefore conclude, that so much of the decree below as declares, that the East India Stock and the dividends thereon made no part of the father's personal estate at the time of his death, be reversed: and, being reversed, that in taking the account the said East India Stock and the dividends thereon be considered as part of the father's personal estate, and subject to his covenant in the marriage articles.

Note.—See the preceding case.

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Feb. 24, 25.

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BOROUGH,
L.C.

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RANDALL v. WILLIS.†

(5 Vesey, 262—276.)

Articles before marriage for settling specific real estates of the husband and also all and singular his personal estate of what nature or kind soever: a proper execution would be by a covenant, that any real estate which should be purchased with the personal estate, should with respect to the objects of the settlement be considered personal estate. The settlement therefore, made after marriage, containing no such covenant, and being in other respects a defective execution, real estates purchased by the husband, according to the evidence in order to defeat the right of his wife, were decreed to be conveyed by his devisee according to the articles.

A gift by him in his life in consideration of service was not disputed: but under the particular circumstances attending the marriage, and in the case of an infant, the Court appeared to question its validity.

By articles, dated the 2nd of October, 1776, executed previously to the marriage of Robert Randall and Elizabeth Dugate, reciting the intended marriage, Randall in consideration of the marriage portion, he was to have, and of love and affection, &c. covenanted, that within three months from the marriage he would convey to the use of Thomas Dugate, the father of Elizabeth, and Ezra Willis, her uncle, and their heirs, certain

† *Re Clarke* (1887) 35 Ch. D. 109; in C. A. 36 Ch. D. 348; 56 L. J. Ch. 981.

estates and premises, described, to the use of Randall and his heirs until the marriage; and after the marriage, to the use of Randall and his intended wife during their lives and the life of the survivor; and after their decease then to be sold, in trust, that the money should be paid and distributed among such children as they should have during their lives at their decease; and, in default of such issue, to the right heirs of Elizabeth Dugate. He farther covenanted with Thomas Dugate and Ezra Willis, their heirs, executors, and administrators, that he, the said Robert Randall, or his heirs, would within three months next after the intended marriage convey, release, surrender, and assure, all the said messuages, lands, and tenements, with their appurtenances, unto the said Thomas Dugate and Ezra Willis and their heirs, to such uses, intents, and purposes, as were therein before mentioned, and to and for no other use, intent, and purpose whatsoever. The articles then proceeded in these words:

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“And also all and singular my personal estate of what nature or kind soever.”

By the same articles Thomas Dugate in consideration of natural love and affection to his daughter, and for other considerations, agreed to make and pay her equal in fortune with his other daughter Ann Dugate at the time of the decease of him and his wife; and Ezra Willis covenanted with Randall, that he would after the decease of his wife Dinah Willis give and dispose of by will or otherwise all his personal estate, to be so divided between Elizabeth Dugate and her sister Ann Dugate, in case the marriage should be solemnized.

The marriage was celebrated soon after the execution of the articles. They were very unequal in point of age: he being forty-three; she, only eighteen. She was very averse from the match: but was persuaded by her friends: her father being in bad circumstances. Randall received no fortune from her father: but about 20*l.* were laid out for clothes.

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By indentures of lease and release, dated the 4th and 5th of November, 1776, after the marriage, between Randall and his wife of the first part, Thomas Dugate of the second part, and Ezra Willis of the third part, Randall conveyed and assigned all the personal estate and effects, of which he was possessed at the

RANDALL time of the execution of the said articles, to the same uses as the
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WILLIS. said messuages, lands, &c. were by the said articles covenanted, and by the said settlement actually settled and assured. Thomas Dugate and Ezra Willis did not enter into any covenants upon this settlement.

Randall having lived upon very bad terms with his wife, died upon the 30th of May, 1797, without leaving any issue. By his will, dated the 17th of September, 1794, he devised to Dinah Willis, his half-sister, widow of Ezra Willis, who died before him, all his real estates, except those comprised in the articles, to hold to the said Dinah Willis, her heirs and assigns; and he appointed her sole executrix.

At the time of the execution of the articles Randall had personal property to the amount of above 6,000*l.*: a considerable part of which consisted of stock. His real estate at that time did not amount to more than 50*l.* a-year; the whole of which was comprised in the articles and settlements. Very soon after the marriage he sold his stock; called in his personal estate; and laid out the produce in the purchase of real estate, of the value of about 130*l.* per annum. Upon the death of Ezra Willis, Randall received 844*l.* 2*s.* 11½*d.* in right of his wife; which was taken by agreement as her distributive share; and 600*l.*, part of that sum, was given by him to Dinah Willis in consideration of her long services as shopwoman in his trade as a grocer. The personal property, which he possessed at his death, was not sufficient to answer his debts.

[264] The bill was filed by his widow; praying, that the settlement may be set aside, so far as it varies from the articles; and that the plaintiff may be declared entitled to a satisfaction out of the real estates, so devised by Randall, and also his personal estate, to the amount or value of the personal estate, which he was possessed of or entitled to at the execution of the articles; that for that purpose an account may be taken of such personal estate; and in case such personal estate or any part of it was laid out in the purchase of the real estates so devised, then that the defendant Dinah Willis may convey, &c.; and account for the rents and profits; and in case the Court shall be of opinion, that the plaintiff is not entitled to have the real estates conveyed

in or towards satisfaction of so much of the articles as relates to the settlement of the personal estate of Randall, or in case the whole of such personal estate was not laid out in the said real estate, then that the plaintiff may receive a satisfaction to the amount of the personal estate, of which Randall was possessed at the execution of the articles, or so much as was not laid out in real estate, out of the personal estate, of which he was possessed at the time of his death, if sufficient; and if not, the deficiency to be raised by sale or mortgage of the real estates devised, or such as were purchased with the personal estate of which he was possessed at the date of the articles, or the rents and profits.

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[There was evidence to show that Randall purchased the real estate with the intention of defeating his wife's claim under the articles.] The gift to Dinah Willis was not disputed at the hearing. [265—271]

The *Attorney-General*, *Solicitor-General*, and *Mr. Cooke* for the plaintiff cited *Jones v. Martin* (see last case), and claimed the rectification of the settlement by the insertion of a covenant that the conversion of personal estate into real estate should not defeat the settlement. *West v. Erissey*.†

Mr. Mansfield and *Mr. Richards* for the defendant :

* * * The covenant by Randall] does not bind him from defeating it by converting personal property into real estate, wasting, spending it, or giving it away; provided it is given *bonâ fide*, and upon no trust for himself.

* * It is begging the question to say, it is a fraud upon the covenant to convert the personal estate into real. It is no fraud upon it, if the covenant does not prevent it. * * * [272]

LORD CHANCELLOR :

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I do not think it necessary to trouble the plaintiff's counsel to reply. The bill comes before me now, praying, upon the ground of an article, that the settlement executed after marriage, as far as it does not execute the intention of the article entered into

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before marriage, shall be rectified; as it happens, in the event, for the benefit of the wife: but it must be determined exactly upon the same principle as if he had a numerous family of children. If the act he did would not have been valid in that case, it cannot be valid against the wife. Whatever disagreement existed between them, whether he was founded, or not, in his opinion upon her conduct, he had no more right to defeat her claim than he had to defeat the whole object of the settlement.

Ever since the case of *West v. Erissey* † it has never been a doubt, that if a settlement executed subsequent to marriage, purporting to be in execution of articles entered into before marriage, does not take the effect, though it follows the words, of the articles, this Court will rectify that error in the frame of the settlement. It is obvious here, that the settlement so drawn is clearly and demonstrably an improper execution of the articles: improper in point of judgment; for the marriage taking place upon these articles, and no other written document of the agreement between them, and the articles formally executed under seal, whatever the rights of the parties are by the articles, it is totally impossible, that any parties to these articles could be discharged from any one obligation imposed by the articles. The first thing, that occurs upon the settlement, three months having been given for the preparation of it, is, that the covenant of the father is omitted. It is of no consequence, that his circumstances were at that time bad. He is alive. It is of no moment, whether in point of value it might be useful to the wife and children. That is matter of mere speculation. It might not be likely, that much might come from the father: but the attorney had no right to leave it out. It was a clear mistake * of the attorney. The covenant of Willis, a man of substance, is also omitted. That covenant was likely to be attended with considerable benefit. In fact, I suppose, they found it better to take the distributive share under the agreement than according to the strict covenant: or perhaps the articles were unknown: but if they had been known, it was a fair option to take the distributive share, about 800*l.*, rather than wait the specific performance of the covenant; which must have been suspended during the life

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of Dinah Willis. In both those instances there is a variation from the articles. The settlement, which is a peculiar settlement, is, that the estates described, which are all the real estate he had, shall be conveyed to trustees to the use, after the marriage, of him and his wife for their lives and the life of the survivor, and after their decease to be converted into personal estate, and divided equally among the children, and in default of such issue to the right heirs of the wife. After stating this to be the effect of the agreement of the parties as to his real estate it proceeds thus:

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“And also all and singular my personal estate of what nature or kind soever.”

In the exposition of these words there is one construction, they obviously cannot bear: that is, a specific settlement of every article of personal estate, that within the period allowed for the settlement he might be possessed of. Personal estate is so fluctuating in its nature, that it is impossible to make every thing, every chair and stool, the provisions in the house, &c. the subject of a settlement. The meaning is truly expressed, but defectively executed, in the settlement; that it is an engagement as to the personal estate, when it could be ascertained, viz. at his death, giving the use to him clear and absolute, and the residue at his death to be the subject. But it is to be settled so, that it cannot be disappointed by any act by him; and nothing is more obvious than what ought to be the covenant: that easy, plain, covenant, that the lands he might purchase should, with regard to the wife and children, the objects of the settlement, be considered as personal estate: otherwise it conveys no right, a chance, and nothing but a chance; which the Court will never intend upon an article.

It is said, there have been many settlements, in which a covenant by the husband, or the father of the wife, as in *Jones v. Martin*, *that the personal estate shall be left in a particular manner, has been confined to what he should leave at his death. If a formal deed was executed before marriage, containing such a covenant, it is impossible, that I could do any thing with it. But an article is only the head and minute of an agreement, not to be followed literally. In *West v. Erissey* the deed, that was

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executed, an article before marriage, was to settle the estate in such a manner, that the husband would have had an estate tail. The settlement copied the very words of the articles: but the House of Lords held, that the person who was to execute that article, if he had used proper skill, ought not to have taken the very words, because he gave the estate tail to the father; which could not be the intention; but that he ought to have limited an estate for life, with remainders in strict settlement. What is the ground of that determination? The words were simple and plain in the articles; and the same words were taken in the settlement: but the effect was to put it in the power of the father by an act, a formal act, and which it was to be presumed he would have done, to defeat the object.

In this case I take the sense of the articles to be, that he should leave all his personal estate at his death tied up in the same manner that the real estate was directed by the settlement: so that it should not be in his power, if he quarrelled with his wife or children, by laying out that personal estate in land, and giving it to any purpose he thought fit, to defeat the object. He might have done, I will not suppose so harsh a thing as giving it away from them; but he might have done this: he might have limited strict estates for life to his children: but that would not be within the purpose of the articles; and the children might have reclaimed it. The person therefore, who drew the settlement ought to have inserted the covenants of the uncle and the father, all within the consideration of the settlement, and the object of the marriage; and for the same reason he should have added that short and obvious covenant by the husband, that what real estate he should purchase should be considered as to the objects of the settlement as personal estate.

As to the other point, whether the gift of the 600*l.* to the defendant is good, there is no occasion to discuss that. They do not quarrel with it. But I do not think, if the article had been

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*brought before the Court for execution, upon such a marriage, and the case of an infant, where it is impossible, that any thing, that would defeat the effect of the settlement, could prevail, if he had made a gift, choosing to deprive himself of it, it would have been held good.

The prayer of the bill is very correctly confined to the real estate purchased with the personal estate. They do not pray, that all the real estate he died seised of may be conveyed; for if any estate descended to him during the marriage, that was not a subject of the settlement. Upon the fact all the real estate he had at his death was the purchases made by him out of the personal estate.

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The decree declared, that upon the true construction of the articles the personal estate, which Robert Randall was possessed of at the time of the execution of the said articles, and which hath been since laid out in land, ought to have been subject to the provision made by the said articles and settled for the benefit of his wife and children, in like manner as the real estate, which was the object of the settlement. An account was directed of the personal estate, which the testator was possessed of at the time of the execution of the articles; and the Master was directed to inquire, whether such personal estate or any and what part thereof was laid out in the purchase of all, or any and which, of the estates devised by the will of the testator to the defendant Dinah Willis; and it was ordered, that the said defendant do convey such estates as the Master shall find were purchased with such part of the testator's personal estate, as the testator was possessed of at the time of the execution of the articles, to the plaintiff, or as she shall appoint. An account was directed of the rents and profits of the estates purchased with the said personal estate, come to the hands of Dinah Willis, and an account of the other personal estate of the testator, come to her hands, and of his debts, &c. The costs of all parties were directed to be paid out of the testator's estate.

FORSTER v. HALE.

(5 Vesey, 308—322.)

For the report of this case on appeal see 4 R. R. 129.

1800.

Feb. 28.

*Eschequer.*MACDONALD,
C.B.

HOTHAM, B.

PERRY, B.

THOMPSON, B.

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GRAY v. MATHIAS.†

(5 Vesey, 286—295.)

Voluntary bond during cohabitation to a woman, previously of a very loose life: soon afterwards another bond, expressly securing a continuance of the connection by an annuity in case of separation. Bill by the executor to have the bonds delivered up was dismissed with costs: the former being considered unimpeached: the latter void at law, as *pro turpi causa*.

WILLIAM JAMISON, Esq. cohabited with the defendant Jane Mathias from the year 1793 till his death in September, 1797. On the 14th of April, 1796, he executed a bond to her in the penal sum of 700*l.*; with a condition, that if the heirs, executors, or administrators, of the said William Jamison shall pay the said Jane Mathias, her executors, administrators, or assigns, the sum of 350*l.* within six months after his decease, with interest from the day of his death, then the obligation should be void.

On the 6th of September, 1796, he executed another bond to her in the penal sum of 1,000*l.*; with a condition, reciting the past connection; and that the above bounden William Jamison from the affection, which he hath and beareth for and towards the said *Jane Mathias, and for and towards her future maintenance and support in case of his death before her, or of his declining to cohabit and live with her, hath agreed to settle and secure to her the annuity or yearly sum of 60*l.*, payable, as after mentioned: now the condition is such that in case the said William Jamison, shall decline to live and cohabit with, and support, the said Jane Mathias, and shall separate and part from her, then the above-bound William Jamison his heirs, executors, or administrators, any or either of them, shall and will well and truly pay or cause to be paid unto the above-named Jane Mathias and her assigns one annuity or yearly sum of 60*l.*, payable half-yearly during the natural life of the said Jane Mathias upon the 21st of December and the 24th of June, the first payment thereof to be made upon such of the above-named days as shall first happen after such separation and living apart; but in case the

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† *Re Vallance, Vallance v. Blagden* (1884) 26 Ch. D. 353, 356.

said William Jamison shall continue to live and cohabit with the said Jane Mathias to the time of his death, then if the heirs, executors, or administrators of the said William Jamison, &c. shall pay, &c. to her or her assigns one annuity of 60*l.* &c. during her life, then the obligation shall be void.

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MATHIAS.

Mr. Jamison died possessed of very considerable property, to the amount of about 30,000*l.*; which he bequeathed in favour of his infant daughter by a deceased wife; with a limitation over in case of her decease under the age of twenty-one to the plaintiff; whom he appointed executor and guardian to his daughter.

The bill prayed, that the defendant may be decreed to deliver up the bonds; or that the latter bond may be declared to have been given in lieu and satisfaction of the former; and for an injunction.

An injunction was granted as to both bonds by the Court of Exchequer upon motion; after a verdict had been obtained in favour of the first bond.

At the time of the execution of these bonds Mr. Jamison was about forty years of age. There was contradictory evidence as to his being a man of weak understanding, and given to excessive drinking: but the proof of intoxication did not apply to the execution of the bonds; which took place in the presence of the attorney, who drew them; and he was the witness to them. The evidence was also contradictory upon the fact, whether these transactions *were voluntary acts or in consequence of her pressing him. The plaintiff also produced evidence, that the defendant had been a very loose woman, before she lived with Mr. Jamison; and that he said, he had given her a bond for 60*l.* a year; and he thought he had done very handsome.

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The daughter of Mr. Jamison died under the age of twenty-one, after the suit had been instituted.

Mr. Plumer and *Mr. Fonblanque*, for the plaintiff: †

If the transaction was entered into *pro turpi causâ*, and is against public policy, it is void at law: but this Court has a concurrent jurisdiction. The consideration for future cohabitation appears

† The arguments *ex relations*.

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upon the face of one of these bonds; and the first bond must fall with the other; as the same connection subsisted. *Whaley v. Norton*; † *Priest v. Parrot*; † *Turner v. Vaughan*.§ To make it good it must appear, the cohabitation was to cease. *Hall v. Elliot*, in the Court of Exchequer. In point of conscience the defendant's claim is not available. * * If the second bond is bad, so is the first, in prosecution of the same purpose, given by the same person to the same person, an artful woman, at her importunity; she sending for the attorney; and the commerce continuing to the last moment of *his life. * *

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Mr. Richards, Mr. Hart, and Mr. Cox, for the defendant:

* * There is no case, or even dictum, that if a man lives with a woman, and gives her a bond or security, that security is therefore void. There is no improper condition whatsoever in the first bond. Shall a man be permitted to come here, desiring to have back again a bond, which yesterday he gave, thinking it meritorious? What is there against the second bond? * * *

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* * If this is an illegal bond, why should the plaintiff come here, if it is void at law? The only ground, upon which they are right here, must be, that the testator was unduly influenced: but there is no evidence of that.

Mr. Plumer, in reply:

As to the question of jurisdiction, upon the objection arising on the face of the instrument, it is equally within the determination of a court of equity. * * The Court will interfere, wherever it is contrary to the policy of the law; and will not permit the defendant to hold the instrument, in order to harass the plaintiff. *Harrington v. Du Chatel* || was decided upon the principle, that the bond was against the policy of the law: the objection, I admit, not appearing on the face of it. *Law v. Law*; ¶ *Whittingham v. Thornburgh*.** In *Channel v. Churchman* †† notes given to carry on a tithe suit were decreed to be delivered

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† 1 Vern. 483.

‡ 2 Ves. 160.

§ 2 Wils. 339.

|| 1 Br. C. C. 124.

¶ For. 140; 3 P. Wms. 391.

** 2 Vern. 206.

†† In the Court of Exchequer in 1776.

up, though there was a defence at law. * * It is said, there is a defence at law: but as to the first bond at least the plaintiff has a right to call upon the defendant to say, what was the consideration. * * * [He distinguished the case of *Franco v. Bolton* (3 Ves. 363)† where similar relief was refused to a plaintiff in equity who had previously pleaded at law the invalidity of a similar bond and had abandoned the plea.]

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MACDONALD, Chief Baron, stated the case and delivered the opinion of the Court:

Feb. 18.

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The principles, upon which cases of this sort are to be decided, are now so well settled, and so extremely clear, that I think myself dispensed from the necessity of going through all the cases. The case in short is this. In the course of cohabitation the first bond was given: a simple voluntary bond. In the course of the same cohabitation the second bond was given: which upon the face of it states a continuance of the cohabitation: and makes it the interest of one of the parties, and no matter, which, that that connection should be discontinued. As to the first bond, it is most clearly settled, in cases, where it has not been the direct point, and in cases where it has, as for instance, in *Dillon v. Jones*, where it *was made a question, whether there was any understanding for a continuance of the connection in the breasts of the parties, though it was not expressed; and the defendant being interrogated, said, there was not; and therefore it was held good, though only voluntary. In *Hill v. Spencer*‡ that is most clearly laid down; and Lord CAMDEN said, there is little difference between such a bond to a person in this unhappy situation and giving a sum of money.

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As to the second bond it is equally clear, that where this sort of consideration appears upon the face of the instrument, it cannot be countenanced in a court of equity; to set aside all considerations of religion and morality, for an obvious reason of public policy: all proper connection can arise only in the honourable state of marriage. It is said, the plaintiff brings this bill rather as guardian to the daughter than on his own

† Subsequently explained and disapproved by Lord ELDON in *Bromley v. Holland*, 6 R. R. at p. 63 (7 Ves. at p. 19), and see post, p. 126.—O. A. S.
‡ Ambler, 641.

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account. How far he was right in not smothering this transaction for her father's sake, it is not for me to say. He thinks it for his character to hang up his benefactor by the road side, with all his infirmities about him. He comes with no very favourable claim to the interposition of this Court. But he comes in a case desperate with regard to the first bond; for nothing is proved or shewn, that can in the least invalidate that as a voluntary bond. Therefore as to that the bill must be dismissed with costs.

With regard to the second bond, without entering at all into the question of jurisdiction, it turns upon a plain point. The plaintiff comes upon a bond, declaring upon the face of it, that it is an invalid bond. The defendant should have demurred to the action upon that bond. Instead of that he comes here; professing, that it is a piece of waste paper: he goes through the whole length of equitable litigation, bill, answer, commission, &c. at an expense possibly of two or three hundred pounds. In such a case, though Equity may have a concurrent jurisdiction, it is not fitting in the particular case, that Equity should entertain the suit: for it would be a monstrous hardship, if a man should come here, saying, another person has an instrument good for nothing upon the face of it, that there is nothing of discovery wanting, but stating, that if the instrument is ever produced, it is good for nothing, and a piece of waste paper, yet seeking by a long litigation in this Court to have that instrument delivered up. That is a case not to be encouraged; for the plaintiff himself states, he has an irrefragable defence against it. Therefore upon that ground *that part of the bill also, that is, the whole of the bill, must be dismissed with costs.

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1800.
March 17.

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L.C.

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BACON v. BACON.†

(5 Vesey, 331—335.)

Executor discharged from a loss under favourable circumstances.

Exceptions were taken by the defendant John Bacon to the Master's report for not allowing the defendant in his discharge a

† *Speight v. Gaunt* (1882) 22 Ch. D. 727, 743, 52 L. J. Ch. 503; in O. A., L. B. 9 App. Ca. 1, 53 L. J. Ch. 419.

sum of 700*l.*, paid by him upon the 13th of September, 1796, to John Kirby; who was appointed a co-executor with him in the will of the Reverend Nicholas Bacon, and also for not allowing a farther sum of 500*l.*, also paid by the defendant to Kirby in January, 1797; though both those sums were paid by the defendant to his co-executor for the purpose of paying the testator's debts in the country; where Kirby resided. The Master had allowed the defendant only the sum of 787*l.* 2*s.* 2*d.* being the amount of the testator's debts actually paid by Kirby; who died insolvent. He had been the testator's attorney.

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The claim to the full allowance of 1,200*l.* was made by the defendant under the following circumstances, appearing by his affidavit. On the 13th of September, 1796, the testator having died in August, 1796, at his house at Coddendam in the county of Suffolk, Kirby, who resided at Ipswich, *called upon the defendant in London; and requested an advance of 700*l.*, in order to enable him to discharge the funeral expenses, and to pay such of the creditors of the testator as lived in the neighbourhood; where most of them resided; with which request, Kirby informing the deponent he had no money belonging to the testator in his hands, the deponent immediately complied: knowing, that considerable debts were owing from the testator to persons in the neighbourhood of Kirby; and conceiving, that Kirby, as being one of the executors, and living on the spot, was the proper person to examine into and settle such debts; and that the deponent could not have been justified in putting the estate to any expense in paying the said debts himself.

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The affidavit farther stated, that upon the 10th of January, 1797, Kirby again called upon the deponent; and produced a book of accounts, containing a list of debts, which he alleged he had paid, and which exceeded 700*l.*, in which book was also an account of other debts, remaining unpaid; which with the debts alleged to have been paid exceeded 1,200*l.*: Kirby then requested, that the deponent would advance him a farther sum of 500*l.*, in order to enable him to discharge the debts then remaining unpaid; and the deponent conceiving, that the entries in the book were true, complied. Kirby had been for many years the confidential agent and attorney of the testator; drew

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his will; and had been entrusted by him with the receipt and payment of very large sums; and the deponent had frequently in the testator's life by his directions paid Kirby considerable sums for the use of the testator.

The will contained the following clause:

[*333] “And I do hereby expressly declare, that neither the said John Brand and Samuel Kilderbee nor my said executors any or either of them their or any or either of their executors or administrators shall be answerable or accountable for any more money than shall actually come to his or their hands, nor for any loss that shall or may happen in placing out and continuing at interest any part of my said personal estate nor for the misapplication or non-application of all or any part of the money that shall be received by them respectively by virtue of this my will (provided that such loss do not proceed from or be occasioned by his or their wilful default or neglect) nor the one of them for the other of them but each of them for his own act and deed receipt *and default only and I further will and direct that my said executors and each of them their and each of their executors and administrators shall and may deduct and reimburse himself and themselves all such losses costs charges damages and expenses as he and they shall and may sustain bear pay expend or be put unto in the execution of this my will or for or by reason of the management of the trusts hereby in them reposed.”

Brand and Kilderbee were trustees appointed for a particular trust.

The will was disputed by the next of kin. After that contest was decided in favour of the will, Kirby having died in the interval, probate was granted to the defendant. The plaintiff, entitled under the trusts of the will, and praying the usual accounts, was an infant.

Mr. Piggott and *Mr. Alexander*, in support of the exceptions:

The particular circumstances of this case make it very hard, if these sums are not allowed to this executor. They were applied for by Kirby for the sole and express purpose of paying debts in the neighbourhood of the testator's residence: Kirby a

professional man, constantly employed by the testator in his affairs ; and the debts to be answered by the money being to be answered in the neighbourhood. * * Kirby must have been intended to perform some duty : what, if not that of paying the debts upon the spot, where the creditors resided ? The testator has not only named him executor, but placed confidence in him during his life, as his attorney ; not a limited confidence, as in the case of a banker.

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Mr. Graham, for the plaintiff :

The Court certainly now leans against charging even executors. It is true, Kirby was appointed executor : but he never proved the will ; upon which there was great litigation, before it was established. Then it comes to the case of an agent, appointed by the executor. The import of the clause in the will is only, where no wilful default is to be imputed personally to the party ; and cannot excuse carelessness and neglect. By his own act the defendant has occasioned this loss. He trusted a person not in the character, in which the testator intended him. If he had proved the will, he would have taken upon himself that confidential character the testator intended to clothe him with ; and would have been worthy of trust.

Mr. Piggott, in reply :

Having observed, that the will was not proved till after Kirby's death on account of the dispute concerning it, but that during that time it was necessary some one should act, and take care of the effects, was stopped by the Court.

LORD CHANCELLOR :

Supposing, Kirby had not been co-executor, but that the executor living in London, and receiving money of the testator's, had remitted to the attorney of the testator to pay the debts : could he have been liable ? Kirby was in no insolvent circumstances. He was a man in business at Ipswich ; had been the attorney of the testator (I take him no higher than that) ; was acquainted with all his affairs ; had his accounts in his hands ; * and the first payment was three weeks after his death. In the

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ordinary management of executor how was he to pay the funeral expenses and the number of small debts appearing upon the books of the testator without sending the money? The payment is made by the defendant only, because he happened to have money of the testator's in his hands at the time. If the business was transacted in the ordinary manner, unless there was some circumstance to awaken suspicion, surely the allowance is fair. Suppose, he had paid the money into the hands of his own clerk, and the clerk had ran away. Kirby could not prove the will. Supposing he had, what would have been the difference? The mention of him in the will adds to the confidence the testator may be supposed to have in him as an attorney of credit in the town. By proving he would not have been more worthy of trust than by the nomination the testator had made of him as executor. It would have been only a difference of character; but would not invest him with more authority.

The exceptions were allowed.

MILLS v. NORRIS.†

(5 Vesey, 335—339.)

1800.
March 22.

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Under a disposition by will to the children of A. and B. payable at twenty-one or marriage, with a limitation over upon failure of issue in the lives of A. and B. it was held, that all the children without restriction were entitled; and an apportionment being directed, and the interest ordered to be paid to those, who had attained twenty-one, children born afterwards, though entitled to a share of the capital, were not allowed to claim the by-gone interest.

ANDREW MOFFATT by his will, dated the 26th of June, 1780, after charging his real and personal estate with payment of his just debts, legacies, and funeral and testamentary expenses, and giving several legacies and annuities, gave and devised all his freehold estates at Barking in Essex to trustees and their heirs, upon trust to receive the rents and profits during the minority of Andrew Moffatt Mills; and upon his attaining his age of twenty-one years upon trust to convey the said hereditaments and

† *In re Jeffery*, '91, 1 Ch. 671, 60 L. J. Ch. 470; *re Burton's Will*, '92, 2 Ch. 38.

premises to him, his heirs and assigns for ever : but in case he should die before he attains his age of twenty-one years, then that his said trustees should sell and dispose of the same ; and that the money arising by such sale should be paid to and among and equally divided between the children of his daughters Elizabeth Mills and Martha Norris, share and share alike : such of the said children as should be sons to be paid at their respective ages of twenty-one years, and such as should be daughters at their ages of twenty-one years or days of marriage respectively : * And as to all the rest and residue of his estate and effects both real and personal whatsoever and wheresoever, he gave, devised, and bequeathed, the same to the same trustees and the survivor, his heirs, executors, and administrators, upon trust to sell and dispose of the same as soon as they could ; and upon receipt of the monies to arise therefrom to place out and invest the same upon government or real securities ; and from time to time to call in and invest the same in other government and real securities, and to pay, apply, and dispose of the same and the interest and produce thereof to and amongst and be equally divided between and to go to the child and children of his said two daughters Elizabeth Mills and Martha Norris in like manner as the money to arise by the sale of his real estate, in case Andrew Moffatt Mills should die, before he attains his age of twenty-one years, as before directed ; and in case any child of his said daughters should marry, and die in the lifetime of their respective mothers, leaving issue, then he directed, that the issue of such child should stand in the place of their parent, and be entitled to, and receive, such sum of money as such parents would have been entitled to under his said will, had they been living ; and in case his said daughter should die without issue or having had issue such issue should die without issue in the life-time of his said daughters, then in trust, that his said trustees should transfer all his real and personal estate to his brothers James and Aaron Moffatt, their heirs, executors, and administrators ; and he declared, that if any child of his daughter Elizabeth Mills, being a daughter, should marry, before she attains twenty-one, without the consent of her parents, if living, then such daughter or daughters so marrying should forfeit one half part of all such

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sums of money as she would have been entitled to under his said will ; and he appointed some of the trustees executors.

After the testator's death a decree and subsequent orders were made for taking the accounts ; and the Master was directed to inquire, who were entitled to the residue, and in what shares, and to apportion the residue, subject to the contingencies in the will ; and it was ordered, that the interest and dividends, which should from time to time accrue due upon the shares of the residue, which the Master should find the several parties were so entitled to, should be paid to such of them as were of age.

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Upon the Master's report it appeared, that the plaintiffs Andrew Moffatt Mills and Elizabeth Finch Bond, two of the children of the testator's daughters, had attained twenty-one : the former, upon the 3rd of September, 1796 ; the latter, upon the 21st of October, 1797 ; at which time there were four other children living. The dividends upon the stock and securities apportioned to Andrew Moffatt Mills had been received by him from the time he attained twenty-one. Adolphus Robert Bayard, another child of Martha Norris, by her second husband John Bayard, was born upon the 30th of May, 1799, and was the only child of either of the testator's daughters born since the last order, made upon the 26th of March, 1798. The Master therefore found, that there are seven persons entitled to the residue, and therefore the other six must abate.

An exception was taken to the report upon the ground of considering Adolphus Robert Bayard entitled to a share of the by-gone interest, and reporting the shares of the other six children in the proportions, according to which the Master had made them abate.

Mr. Stanley, in support of the exception :

The objection is, that the Master ought not to have made the deduction for the seventh child : there being but six at the time. There is a variety of cases deciding, that where in such cases a particular time is specified, as where the parties are to be entitled at the age of twenty-one or marriage, any born after one has attained that period are to be excluded. Upon the clause of the will giving the limitation over to the testator's brothers in the

event of the failure of issue of his two daughters your Lordship was of opinion, that the disposition extended to all the children of the two daughters, without reference to the age of twenty-one; and though each child would have a vested interest at that age, yet it would be liable to be divested by the birth of others. The Master's judgment is not opposed as to the capital: but it is insisted as to the interest, that the rights of the parties to the by-gone interest of the property shall not be disturbed. It has been determined that an after-born child will be entitled to a share of the subsequent interest, and cannot claim the by-gone interest.

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The *Attorney-General* and *Mr. Alexander*, for the report :

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It is clear, the testator in this disposition of the residue did not mean it to go in all respects as the money to arise from the estate to be sold, only, that it should be divided in the same manner. It is clear, he did not mean the residue to vest absolutely and be paid upon marriage. During the lives of the two daughters it must remain in suspense both as to the interest and the capital; for nothing is given to the children, till the persons are ascertained; and then the principal and interest are given together as one accumulated fund. It is clear, the testator meant to let in all the children; and if they do not take in hotchpot, the fund will not be divided equally, which the will directs. This is certainly a very inconvenient construction: but it is the necessary one. It is very difficult to say, what the meaning of this will is. The object of the residuary disposition is interest as well as capital. In *Shepherd v. Ingram*,† upon a disposition of all the residue of the real and personal estate to the children of Lady Irwin, share and share alike, with a limitation over upon failure of issue, it was determined, that all the children she should ever have would upon their respective births be entitled to share; the income both of the real and personal estate belonging to those in existence: letting in the others, as they came *in esse*: that is, the whole upon the birth of the Marchioness of Hertford and till the birth of another child belonging to her: and from thence till the birth of the third it was divisible between the two; and so on.

† *Amb.* 448.

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Mr. Stanley, in reply :

The Court, when directing an inquiry, who were the persons entitled, must have understood, that the children were entitled to some present benefit, viz. the income, according to their number at the time that reference was made. The construction now contended for would be a very unfortunate one; for then no one will be entitled till the death of the two sisters.

LORD CHANCELLOR :

[*339] The determination upon Mr. Shepherd's will was certainly, as it has been stated by the *Attorney-General*; and upon Lady Hertford's marriage all the accruing interest, of which she had a larger share than the other children, was carried over to her settlement. It is much the most beneficial construction *for them all. Upon this will the interest seems tied up as well as the principal. I rather incline to allow the exception. That is the most convenient and simple construction to put upon the will; and much the most beneficial to them all.

The exception was allowed.

Note.—It is questionable whether any child born after the plaintiff A. F. Mills attained 21 should have been let in to share in the residue as the rule now stands.—O. A. S.

1800.
March 1, 3,
25.

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EDEN v. SMYTH.

(5 Vesey, 341—357.)

A legatee, son-in-law to the testator, was held entitled to his legacy, discharged from debts due by him to the testator, and a debt, for which the testator was his surety, upon evidence from the testator's accounts, letters, and memoranda in his hand-writing.

SIR FREDERICK EDEN, Bart. upon his marriage in January, 1792, with Miss Smyth, the only child of Mr. Smyth, settled 6,000*l.* his own property; and Mr. Smyth also made a considerable settlement; and gave 1,000*l.*, as part of the portion of his daughter, for the purpose of purchasing furniture, a carriage, and other things requisite for the proposed establishment. He also paid the sum of 425*l.*† to relieve his son-in-law from a con-

† In the original report this sum is stated apparently by error as 445*l.*—O. A. S.

tract, that had been entered into for the lease of a house, which it was not judged proper to complete. He lent Sir Frederick Eden 1,000*l.*, to be applied in payment of *debts; taking his bond, dated the 31st of December, 1791, for that sum. The 1,000*l.* advanced for furniture, &c. not proving sufficient, and it not being convenient to Mr. Smyth to advance more, in January, 1792, he joined Sir Frederick Eden in a bond to the Reverend Jonathan Boucher, to secure 1,000*l.* lent by him to Sir Frederick Eden. In 1794, Sir Frederick Eden, in consequence of re-building a party-wall and repairing his house, having occasion for the farther sum of 900*l.*, Mr. Smyth borrowed 700*l.* of George Watson, and advanced 200*l.* himself; accommodating Sir Frederick Eden with both those sums; who gave his bond, dated the 10th of July, 1794, to Watson, for securing the re-payment. In 1796, Mr. Smyth discharged that bond; but took no assignment.

Mr. Smyth died upon the 23rd of September, 1797. By his will, dated the 18th of May, 1797, among other legacies, he gave the sum of 1,000*l.* to Sir Frederick Eden, to be paid within twelve months after his decease, or as soon after as his executors conveniently could. He gave the residue of his personal estate to his younger grandchildren, the issue of Sir Frederick and Lady Eden, born or to be born; and he appointed his wife, Thomas Forsyth, and George Watson, executors. Sir Frederick Eden's bonds for 1,000*l.* and 900*l.* were found in the testator's possession; and a memorandum, that the testator had become surety for Sir Frederick Eden to Mr. Boucher by bond, bearing date some time in January, 1792. On the back of the bond, dated the 31st of December, 1791, were indorsed receipts of interest; viz. the 17th of January, 1793; the 20th of January, 1794; and the 23rd of January, 1795; each for 50*l.*, being one year's interest. It did not appear, that any interest had been since paid.

The bill was filed by Sir Frederick Eden, claiming his legacy; and the question raised by the answers of the executors was, whether under the circumstances he was entitled to the legacy, or on the contrary was to be charged with 1,900*l.*, as due to the testator's estate.

The following evidence was produced for the plaintiff:

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Extract of a letter, dated the 18th of June, 1797, from the testator to Lady Eden, the plaintiff's mother, upon the subject of Sir Frederick Eden's affairs.—“In the first place it is necessary to *inform you, I have not the least recollection of my ever mentioning or ever intending to give them 200*l.* a-year. Since I had the honour of conversing upon their situation with you at Bath I have released them of 1,000*l.* I lent him for a particular purpose I cannot name. I have paid Boucher's interest on 1,000*l.*; and principal must fall to my lot. These two sums make 100*l.* a-year. In the month of December, 1795, I gave him 500*l.* to pay his debts. The sums before advanced I shall not here mention: at some future time I mean to shew you a statement of them. From them and what is above written you certainly must excuse me, when I tell you, I go no farther.”

The testator was in the habit of drawing out annual statements of his property. In 1795, he acquired a considerable fortune, about 14,000*l.*, by the death of his wife's uncle the Reverend Henry Higford, who died in March, 1795.

The defendant Mary Smyth by her answer stated, that she has often heard the testator say, he should discharge Mr. Boucher's bond for 1,000*l.*, as soon as he should receive a mortgage, part of Mr. Higford's property; which he did not live to receive. The answer of Watson stated, that he had often heard the testator say, he must pay Mr. Boucher's bond; but does not recollect or believe, that he declared he should pay it, in order to discharge the plaintiff, as soon as he should receive the amount of Mr. Higford's mortgage.

The depositions of Robert Smyth, Esq. of Gray's Inn, stated conversations with the testator; who told him, that, it being thought he had not done enough for the plaintiff, he wished to prove to him (the deponent) that he had been very liberal. He produced a paper, in which it was stated among other things, that the plaintiff had received the sum of 1,000*l.* from Mr. Boucher; for which he had given his bond; and that the plaintiff had received from him (the testator) the sum of 1,000*l.* to enable him to discharge his debts; for which sum he had given his bond. The testator also stated the 900*l.* advanced upon the plaintiff's bond to Watson; and said, he had given the plaintiff

the two last-mentioned sums of 1,000*l.* and 900*l.*; and as to the bonds given for them the plaintiff should *never be called upon; for he (the testator) meant to discharge and pay off such bonds; that he had only taken his bond for 1,000*l.*, in order to have a check upon him; adding (to the best of the deponent's recollection) "You see Mr. Smyth I have not been ungenerous. I have given Sir Frederick Eden all these sums; and I consider myself as bound to pay Mr. Boucher's bond. It is mine. I shall settle it." The testator had other conversations with the deponent to the same effect. [And with other deponents.]

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The paper referred to in the depositions of Robert Smyth and Graham, as having been produced to them by the testator, contained *an abstract of the plaintiff's receipts and expenditures, and among them the following articles :

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" Of Reverend Mr. Boucher 1,000*l.*

" Cash advanced by J. P. S.

" For house in Great Queen Street . . . £425

" To furnish house in Lincoln's Inn Fields . . . 1,000

" To discharge debts owing before marriage . . . 1,000

" To repairing his house 900

—
3,325

" To cash advanced December, 1795 . . . 500

—
£3,825"
—

In the annual statements by the testator of his property made previously to Mr. Higford's death, the testator appeared to have stated the plaintiff as indebted to him for the 1,000*l.* bond o December, 1791; but in the annual statements for 1795 and 1796 the plaintiff was not charged with such bond. In the statement dated the 31st of December, 1795, entitled "Debtor general stock—*Per contra* Creditor," on the credit side was the following entry "By Sir F. E——'s bond." No sum was set opposite that article, as in the preceding statements.

[Other statements of account were produced of a similar character and also an unsigned paper of a testamentary character

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in which the legacy to Sir F. Eden and the amount due to Mr. Boucher were included among other legacies and payments enumerated by the testator. This paper had been rejected from the probate.]

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The LORD CHANCELLOR expressed doubts, whether any papers could be read, that were not included in the probate ; and also observed, that it would be very difficult to introduce conversations. When the parol evidence was offered, the counsel for the defendants said, they should not formally object to it ; observing, that it was inapplicable. For the plaintiff it was answered, that the evidence was offered, not to contradict, or even to explain a will, but to repel a demand.

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The evidence was read *de bene esse*.

The *Attorney-General*, *Mr. Richards*, and *Mr. Fonblanque*, for the plaintiff :

The letter to Lady Eden and the various conversations in evidence shew clearly, that the testator did not consider himself as a creditor of the plaintiff in any manner ; and that what advances had been made were then treated by way of gift. The letter to Lady Eden is a declaration in writing, amounting to an assurance to her, that the situation of her son was such as would be produced by those advances, considered as gifts to him by Mr. Smyth. It would be very injurious therefore now to consider Sir Frederick Eden as debtor in those sums. It is clear also from the letter, that the testator considered, that the bond to Boucher was to be paid by him. As to the bond to Watson also, Mr. Smyth having paid it, there can be no doubt, parol evidence may be admitted to shew, that he paid it as a gift to Sir Frederick Eden, and not for the purpose of creating a debt against him. He takes no assignment of that bond ; but simply pays it ; and has it delivered up to him. The bond was gone, after it was paid off ; and he could have no legal demand except for money paid to the use of Sir Frederick Eden. In the statements of his affairs he takes particular notice of the money he had advanced to Sir Frederick Eden ; particularly, in the paper,

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which he shewed to many persons, and to which it is to be presumed he refers in the letter to Lady Eden. One sum on account of the purpose, to pay debts, was certainly a gift. In the annual statements of his property, till 1795, he states Sir Frederick Eden as indebted to him in the sum of 1,000*l.* and also the sum advanced by Boucher, as it was actually advanced for his benefit. At the end of 1795 and in 1796 he does not charge Sir Frederick Eden with that money, nor state it as 'part of his property: nor does he describe him as indebted in the 900*l.* paid on account of the bond to Watson. * * *

[They cited *Aston v. Pye* (see next page); *Byrn v. Godfrey*, 4 R. R. 155; 4 Ves. 5; *Weket v. Raby*, 3 Br. P. C. 16; and *Hinchcliffe v. Hinchcliffe*, 4 R. R. 89; 3 Ves. 516.]

Mr. Mansfield and *Mr. Alexander*, for the defendants, the executors in trust for the infant children of the plaintiff:

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Upon what ground can the Court decide for the plaintiff? The circumstance, that there are no creditors, can make no difference as to the admissibility or effect of the evidence. Neither can the relation of the parties be rested on. This Court does not pay more regard to the consideration of blood than courts of law. Settlements in consideration of blood are void against creditors in this Court just as at law. In what way then is this claim sustained? It is not a testamentary disposition. Then it must be in some way or other a gift in his life or a release. Indeed it can be considered in no other way than as a release. No doubt, the parol evidence is true: but see the effect of parol evidence in such a case; for one part of the evidence is, that the testator took a bond, not intending it should ever be paid, and having regularly received the interest upon it till 1795. He had not released Sir Frederick Eden from the bond alluded to in the letter; though he says, he had. Could that letter have been set up as a defence to an action upon that bond? It is probable, he intended it. All the other papers were in his own possession; and he might have destroyed them at any time. They are not testamentary; and are in fact only the same sort of evidence as parol evidence, the conversations, in which he

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only meant to represent himself as acting with generosity. It amounts only to this ; that he had an intention of not enforcing *that instrument. What consequence follows from that ? The word “ advanced ” is equivocal. * * *

The *Attorney-General*, in reply :

The will was executed previously to the conversation with the witness Smith. The presumption arises from the will itself : and is confirmed and supported by the several transactions. From the direction in the will, that the legacy is to be paid within twelve months, or as soon after as his executors conveniently could, a fair inference arises, that at that time he considered the plaintiff as not indebted to him. The letter is in perfect conformity to the will. They were both a mockery, if the intention was, that these demands should be enforced. * * *

[353] LORD CHANCELLOR :

That position, from which you draw a presumption, from the manner of giving the legacy, will apply to all cases, where a legacy is given to a person indebted to the testator. A legacy certainly imports a bounty to the extent of that legacy.

I wish to consider of this case. Every one must feel the same inclination, that overbears my mind a little. I really believe upon the whole result of the evidence, that if any one had suggested it [*354] *to Mr. Smyth, if a person had been employed to draw his will, (he drew it himself,) he would have released Sir Frederick Eden from the debt : but how to reach it upon any principle, that is safe, I feel very embarrassing.

I will state to you what that case of *Aston v. Pye*† was. What I stated in *Byrn v. Godfrey*, and I stated it correctly, was, that the Court of Common Pleas had determined, they could not make it a release ; and I will state to you, upon what ground, (my opinion, I confess, not quite concurring, but by no means opposing the decision of the other Judges of the Court of Common Pleas), it did turn. The entry, that was found in the testator's book, was this :

† The LORD CHANCELLOR stated this case from his own note-book.

"Pye pays no interest nor shall I ever take the principal except greatly distressed."

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v.
SMYTH.

Lord KENYON, then Master of the Rolls, referred them to a trial at law. An action was brought upon the note. It was contended to be a discharge of the debt. There was a large surplus. It was said, Lord KENYON had observed, there was no proof that there was a large surplus. That proof was given. Upon a case reserved the Court was of opinion, this could not be taken as a discharge in the life of Sir Thomas Pye, but was testamentary. It was adjourned to give time to have that entry proved. In Easter Term it came on. The Court was informed, that probate was refused by the Ecclesiastical Court; and the Court said, that, as it belonged to the Ecclesiastical Court to say, what was or was not testamentary, and they held, it was not testamentary, it must be considered as a discharge conditional of the debt: he never having demanded interest, and having died in affluent circumstances, the executors were not entitled to recover.

That was the ground. I will state to you that I felt a difficulty: but one is satisfied upon the whole case, that upon taking into consideration what the Ecclesiastical Court might have taken into consideration the decision was perfectly just. The plaintiff has the case with him undoubtedly. The weak part of the case always appeared to me to be the stress, that was laid upon there being a large surplus. I think, the Ecclesiastical Court were wrong in not proving that entry in the book; for it was an entry, which could *speak only at the time of his death. They have proved things infinitely more insignificant.

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LORD CHANCELLOR:

March 25.

The result of my opinion upon this case, after a good deal of consideration, is this. The bill is brought for the legacy of 1,000*l*. The bill states, and the answers represent, that there were three debts, that had existed in the life of the testator, upon which, if they are to be taken into the account, not only there can be no demand of the legacy, but the plaintiff will be indebted to the testator's estate to the extent of 1,900*l*., setting off the legacy against one of the debts. It is certainly one of those cases, which embarrasses the Court, in which the object is to

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pronounce upon an instrument, that apparently is a disposition of the property, and ought to be a complete and entire disposition of the property; yet in this and other cases it does not contain, evidently, when the circumstances are stated, the whole intention of the testator expressly as to the administration of his property. That difficulty, too, is always increased from the consideration, that one jurisdiction, which cannot receive the evidence, that may arise from other papers, which is not in the habit of receiving that evidence, is to pronounce upon the *ultimatum* of the will, and another jurisdiction is to execute it, and in executing it is to conform itself as much as possible to the intention of the testator. That, I think, has introduced the necessity of admitting that evidence, that has been given in cases, where the administration is to be carried on in this Court, and all to be received from the Ecclesiastical Court, is the probate.

In this case, I think, the evidence has been very properly received, from the *Bishop of Peterborough's* case † in which his books and papers were admitted. The same rule must hold as to any memorandum, to shew, what he took as the estate to be disposed of: It is equally applicable to shew, what he reckoned debts due to him, and what not, where he has happened to keep any account of his own property. The demand of the plaintiff *primâ facie* is perfectly obvious. The will was drawn by the testator himself. It is not accurately drawn, as may be supposed. It is negligently done. Real estate is devised; and there are no witnesses. But there is a very distinct legacy of 1,000*l.* to the plaintiff. No doubt, upon the face of the will the legacy is due. The *doubt is raised by papers, found in the possession of the testator, that are *primâ facie* evidence of debts due from Sir Frederick Eden to the testator. It is fair therefore to admit all the collateral papers relative to the circumstances of these papers, from which the doubt has arisen, to shew, the legacy is due; and, taking the whole of the papers together, I am satisfied, it was no intention of Mr. Smyth, that these debts should have been put in demand by his executors. As to the 900*l.*, upon the circumstance of the advance of that sum, to supply the necessity that had arisen from the accident of pulling

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† There is no reference in the original report.—F. P.

down the neighbouring house, and the damage thereby occasioned to Sir Frederick Eden's, the principal part of the money was taken from a third person; only part advanced by the testator; he paying it off without taking any assignment, it is perfectly evident (as it would have been very cruel in Mr. Smyth, having advanced it for his son-in-law, with an embarrassed income, having been frequently supplied with money by him) that he had no intention to make any demand for the 900*l*.

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As to the bond for 1,000*l*., which is a direct bond from Sir Frederick Eden to Mr. Smyth, that stands at his death as no debt; for that is specifically mentioned as a debt, from which they were released, in the letter to Lady Eden. When treating with her about the circumstances of the family, he the father of the wife, she the mother of the husband, both treating about the family, he distinctly states it as a sum of money he had given. That letter, I am of opinion, if a release had been pleaded at law, (it is not necessary to produce a formal release), that letter would be evidence of a release, and would destroy the bond.

The other bond was one, in which Sir Frederick Eden and Mr. Smyth were both bound. Mr. Smyth by his will directs this legacy to be paid. At his death no debt at law was due upon that bond from Sir Frederick Eden to Mr. Smyth. Mr. Boucher was the creditor upon that. No debt was due to Mr. Smyth, till the money was paid by him or his executors. Then, and then only, a debt at law arises from Sir Frederick Eden to Mr. Smyth's estate. The nature of the debt at law is such, that it admits of evidence to shew, that the payment by Mr. Smyth, if he had paid the debt of Boucher, was intended in discharge of the engagement, and for the relief of the person engaged with him. It admits of that evidence; and, I think, that evidence exists in the present case, from the whole of the entries in the books, and particularly, a circumstance that is strong and decisive, that at a particular period *his fortune being increased from his wife's family (and he treats himself as a trustee for his daughter, because it comes from his wife's family), he changes the entry in his books. Having treated it as a debt,

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that Sir Frederick Eden was to answer, he turns it over to the other side of the account ; and enters it as a debt his assets are to answer.

The conclusion, that bears strongly upon my mind, is, that he meant the legacy of Sir Frederick Eden beneficially ; and, consistently with that, he meant, that the residue given over to the children of Sir Frederick Eden should not include these three debts ; that these debts should compose no part of that residue, intended to be a provision for the younger children. Therefore decree the legacy to be paid ; and that these several bonds for 1,000*l.*, 1,000*l.* and 900*l.* shall not be the subject of demand against Sir Frederick Eden.

1800.
March 26.

Rolls Court.
ARDEN, M.R.

[359]

KEELING v. BROWN.

(5 Vesey, 359—362.)

The personal estate being amply sufficient for the debts, though not equal to the discharge of the legacies in full, the Court would not marshal the assets in favour of the legatees, by throwing the specialty creditors on the land comprised in the residuary devise.

As to the difference between debts and legacies in an implied charge on real estate by will, *Quære*.

THIS cause arose upon the following will of Aaron Brown :
“ *Imprimis* I will and direct, that all my just debts and funeral expenses be paid and discharged as soon as conveniently may be after my decease by my executrix and executors herein after named. Item, I give, devise, and bequeath unto my nephew John Brown all that my messuage, tenement, or dwelling-house, wherein he now lives at Handley and also the sum of 400*l.* to hold unto him and his heirs, executors, administrators and assigns, for ever.”

The testator then devised another house to his nephew Charles Brown in fee ; and gave another house to his wife for her life, and after her decease to his nephew John Brown in fee. He declared his will, that his wife should have the use of all the plate, linen, china, household goods, and furniture, which should be in his dwelling-house at his death, for her life ; and after her decease he gave and bequeathed all his said plate, &c. to his

nephew John Brown, his executors, &c. ; excepting some articles, which he gave to his wife, to be at her own disposal. Then after some legacies he gave to John Fernehough and Samuel Hatton, their executors, administrators, and assigns, the sum of 2,560*l.*, upon trust to be divided among several persons in several proportions, and among the rest 100*l.* part thereof, unto his nephew John Brown, his executors, &c. ; and as to all the rest, residue, and remainder, of his estate and effects whatsoever, whether real or personal, he gave, devised, and bequeathed, the same and every part thereof to his nephew John Brown of Chesterfield, his heirs, executors, administrators, and assigns, for ever. Then, after the usual directions for the indemnity of his trustees, he appointed his wife and the said John Fernehough and Samuel Hatton executrix and executors.

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v.
BROWN.

The bill, filed by the executors of John Brown of Handley, one of whom was his heir at law, and also heir at law of the testator Aaron Brown, and by legatees under the will of Aaron Brown, against John Brown of Chesterfield, the executors of Aaron Brown, and others, prayed an account of the personal estate, debts, funeral expenses, and legacies ; and *that the personal estate may be applied in a due course of administration ; and that the legacies may be paid thereout ; and if the personal estate shall not be sufficient to answer all the testator's debts, funeral expenses, and legacies, then that an account may be taken of the residuary real estate possessed by the defendant John Brown ; and that the assets may be marshalled ; and that such residuary real estates, or such parts thereof as shall be necessary, may be sold, for the purpose of replacing so much of the personal estate as may have been exhausted in the payment of the testator's specialty debts.

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The personal estate was amply sufficient to pay all the debts, but not to answer the legacies in full.

Mr. Richards, for the plaintiffs :†

Contended, that the testator having directed in his will, that his debts should be paid, the Court would hold that to be a charge of all the debts upon the real estate, according to

† The arguments and judgment *ex relatione*.

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v.
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Williams v. Chitty; † and that, though the legacies are not mentioned in that direction, nor otherwise charged upon the real estate, yet the Court would throw the specialty debts at least upon the real estate in exoneration of the personal estate; in order that the legatees might receive payment of their legacies out of the personal estate: otherwise the legacies would not be fully paid; and the legatees would be disappointed.

Mr. Piggott, for the defendant John Brown, specific devisee of part of the real estate, and residuary devisee and legatee of the real and personal estate:

First, as to the debts: it is impossible to make this a charge of the debts upon the real estate. The direction is, that the debts shall be paid by the executrix and executors; no devise whatsoever of the real estate or any part of it. This is not the case of a devise of real estate, after a direction, that debts should be first paid, as in *Williams v. Chitty*; nor a devise of real estate after payment of debts, as in *Shallcross v. Finden*; † but a mere direction to the executrix and executors, superfluous I admit, but still a mere direction to them, to pay out of the fund, which *was to come to them; and which it is agreed is sufficient to enable those, to whom the direction is given, to comply with it. It is true, if the personal estate of the testator was not sufficient to pay all his debts, the Court would marshal the assets for the benefit of the creditors by simple contract, and make the real estate bear the burthen of so much of the specialty debts as would be necessary to secure a fund for payment of the simple-contract creditors: but in this case it is agreed, the personal estate is amply sufficient for all the debts.

Secondly, what is now pressed is, that, though the personal estate is sufficient for all the debts, the Court shall throw all of them upon the real estate, if the real estate is charged by the will; or shall throw the specialty debts upon the real estate, if not charged by the will with all the debts, in order that the personal estate may be left for satisfaction of the legacies. That would be, not making the real estate bear a charge, to which it

† 3 B. R. 71 (3 Ves. 545).

† 3 B. R. 75 (3 Ves. 738).

is by law liable, as it is to specialty debts, but imposing arbitrarily a burthen upon it neither imposed by law nor by the testator ; and for that there is no authority.

KEELING
C.
BROWN.

MASTER OF THE ROLLS :

I am very clear upon both the points. Here is no charge of the debts upon the real estate ; but a mere direction to the executors to pay the debts, without giving them any other fund than the personal estate, out of which they can fulfil that duty. There is no devise, no trust in them, of the real estate ; which is all otherwise disposed of. I cannot, with all the disposition I always feel to give such a construction to wills as shall make testators honest, construe this into a charge upon the real estate. It would be a violence to all language, and making a will for the testator ; not construing or executing that, which he has made : but it is least of all necessary in this case ; for it is agreed, that the testator's personal estate, which the executors were to possess, was sufficient to enable them to pay his debts. If any of the debts were to go unpaid by the insufficiency of the personal estate, I would certainly marshal the assets ; making the real estate pay as much of the specialty debts as would be necessary to obtain a *fund from the personal estate for payment of the simple-contract creditors : but here it is agreed on all hands, that it is not necessary for the payment of the debts of the testator to do so. Then, there being no charge upon the real estate for payment of debts, and there being an ample fund of personal estate for the payment both of specialty and simple-contract debts, I am asked to throw the specialty debts at least upon the real estate, that enough of the personal estate may be left for payment of the legacies ; which are not charged upon the real estate ; and for the payment of which I am clearly of opinion in this case there is no fund but the surplus of the personal estate, if there shall be any, after payment of all the debts of the testator. I cannot marshal the assets for payment of the legacies. I have formerly fully expressed my opinion upon this point, as to the difference between debts and legacies.† I understand, the LORD CHANCELLOR expressed some doubt about

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† *Kightley v. Kightley*, 2 R. R. 224 (2 Ves. J. 328).

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v.
BROWN.

it † in the case of *Williams v. Chitty*: but upon reflection I still remain of the same opinion.‡

Decree an account of the personal estate, and of the debts, funeral expenses, and legacies; and if after payment of all the debts there shall not be enough of the personal estate to pay all the legacies, the legatees must abate in proportion. There is no other fund for their payment.

1800.

May 13, 14,
18.

ARDEN, M.R.
for the
LORD CHAN-
CELLOR.

[369]

OSBORNE v. THE DUKE OF LEEDS.

(5 Vesey, 369—384.)

A claim of double legacies by two instruments, a will and a codicil, repelled by the internal evidence and circumstances.

The rule against double portions may supply a ground for excluding the presumption that such legacies are cumulative.

THE late Duke of Leeds by his will, dated the 23rd of June, 1791, duly executed to pass real estate according to the Statute of Frauds, § gave, devised, and bequeathed, his real and personal estate to his son and heir the Marquis of Carmarthen, his heirs, executors, and administrators, subject to the payment of his debts and funeral expenses, and to a provision for the Duchess, and also subject among other legacies charged thereon by his said will, to the payment of 10,000*l.* to his son Lord Sidney Godolphin Osborne, upon his attaining his age of twenty-one years, and 10,000*l.* each to all and every of his after-born child or children, on such of them, being a son or sons, attaining their respective ages of twenty-one years, and such of them, being a daughter or daughters, attaining that age or day or days of marriage, which should first happen; and he directed his executor, in case of the death of his wife during the minority of Lord Sidney Godolphin Osborne or during the minority or respective minorities of his after-born child or children or any of them to pay the annual sum of 100*l.*, until their respective ages of seven years, the annual sum of 200*l.* from that period until seventeen, and the annual sum of 300*l.* from that period until their respective portions should become payable, for the

† 3 R. B. at p. 74.

at p. 76.

‡ See *Shallcross v. Finden*, 3 R. B.

§ 29 Car. II. c. 3.

maintenance and education of each of them during their respective mincrities; and he appointed the Marquis of Carmarthen executor.

OSBORNE
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By a codicil, dated the 18th of November, 1796, the testator gave and bequeathed to Lord Sidney Godolphin Osborne all the stocks, funds, and securities for money, he might have at the time of his death standing in his name in the books of the Bank of England or of the East India Company or other public company in England.

By a second codicil he gave some trifling legacies; upon which nothing arose.

He afterwards made another codicil, unattested, dated the 14th of April, 1798, as follows: [370]

“Whereas I have by my will given the sum of 10,000*l.* as a portion for Lord Sidney Godolphin Osborne; and having since otherwise provided for him I now revoke the said legacy; and do hereby give the sum of 10,000*l.* to my dear daughter Lady Catherine Ann Sarah Osborne; and I do hereby declare this to be a codicil to my last will and testament.”

The testator had by indentures of lease and release, dated the 2nd and 3rd of June, 1797, conveyed certain hereditaments upon trust, among other trusts, to raise the sum of 10,000*l.* as a portion for Lord Sidney Godolphin Osborne, to be paid to him, after the death of the testator, when he should attain the age of twenty-one; and, in case he should not have attained that age at the death of the testator, upon trust, that the trustees should pay, apply, and dispose of, the interest of his said portion, or so much thereof as the guardian or guardians of Lord Sidney Godolphin Osborne should think proper, in and towards the maintenance and education of Lord Sidney, until he should attain the age of twenty-one.

The children of the testator at the date of the will were the Marquis of Carmarthen, now Duke of Leeds, and two daughters, amply provided for: all by his first marriage; and one son, Lord Sidney Godolphin Osborne, by his second marriage, with the present duchess. Another daughter, Lady Catherine Ann Sarah Osborne, was born a few weeks before the date of the third codicil.

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v.
THE DUKE
OF LEEDS.

The testator died upon the 31st of January, 1799. The only stock standing in his name at his death was India Stock, of the value of about 8,000*l*.

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The bill was filed by the two younger children against the Duke of Leeds, the heir at law and executor, and against the trustees; the plaintiff Lord Sidney Godolphin Osborne praying only directions for the appointment of a guardian and maintenance: but the question arose upon the claim of Lady Catherine Ann Sarah Osborne to two legacies of 10,000*l*. In opposition to that claim the Duke *of Leeds offered evidence of conversations of the late duke with the duchess and with George Brooks, Esq., his grace's agent, upon the subject of the provisions for his younger children.

The Duchess of Leeds by her depositions stated, that five weeks after the birth of Lady Catherine the testator informed her, he had made a provision of 10,000*l*. for her (Lady Catherine) by a codicil; and in frequent conversations he uniformly declared his intention to give his younger children 10,000*l*. each.

Mr. Brooks stated, that soon after the birth of Lady Catherine the duke observed to him at various times, that, as she had not any provision, he would make a memorandum or codicil, by which he would give her 10,000*l*. About a month after her birth he told the deponent he had made a codicil: by which he had given her 10,000*l*.; repeating, that he had done so, because she had not any other provision; and it was his intention, that she should have as large a provision as Lord Sidney, except the stocks given to him in addition to the said 10,000*l*.; that upon creating the charge for his son in 1797 he declared, he would revoke the legacy to him of 10,000*l*.; and frequently before had declared, he had given him all his India Stock, and Government securities: and expressly declared, that he gave such funds, that his son might have them over and above his 10,000*l*.

The questions were, first, whether the plaintiff Lady Catherine was entitled to two legacies of 10,000*l*.; or to one such legacy only: secondly, whether the evidence could be read in opposition to her claim of two legacies.

[The *Attorney-General*, *Solicitor-General*, and Mr. *Horne*, for the plaintiff.

Mr. Mansfield, Mr. Piggott, and Mr. Romilly, for the defendant.

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OF LEEDS.

The Attorney-General in reply.

The arguments of counsel turned chiefly upon the second question, which is not material to this report.]

MASTER OF THE ROLLS :

May 18.

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The question is, whether according to the true construction of the will and the third codicil, and under the circumstances, the legacy by the codicil is accumulative and additional ; giving a second provision by way of portion of 10,000*l.* above that provided by the will. In the course of the cause evidence was offered on the part of the Duke of Leeds, the executor and residuary legatee ; to prove, that the legacy was not *intended to be accumulative, from declarations by the testator as to the portions he intended for his younger children. An objection being taken to receiving the evidence, it was fully argued ; and I confess I felt some doubt upon the point : but it occurred to me, that upon consideration of the question arising upon the will and codicil it might be unnecessary, if I should form my opinion upon the will and codicil, to come to any determination upon that point as to admitting the evidence ; which I should be very glad to avoid ; and I have satisfied myself, that upon the true construction of the will and codicil, and the circumstances, under which they were made, there is no necessity to resort to evidence to support the construction of the executor ; being of opinion, that this legacy according to the true construction of the will and codicil is not to be held accumulative, but is only a gift of the same portion and provision by the testator to his daughter by name, to which before she was entitled under the description of after-born children.

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Being of this opinion, it is better for me to say little upon the evidence. I should have found great difficulty in admitting it. It does appear most clearly, if the report is right, that Lord THURLOW in *Coote v. Boyd*† thought it admissible on either side. His Lordship did admit it upon that side, upon which, if this plaintiff is right, it was not necessary ; for it is contended, that

† 2 Br. C. C. 521.

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OF LEEDS.

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it is an established rule, taken from the Spiritual Court, that two legacies are accumulative, if given by two instruments. If that is a rule, I admit, I cannot raise a presumption by evidence against it ; and I am inclined to think, it must be taken to be a rule. But in *Hooley v. Hatton*,† from which that is taken, the authorities, from which that rule is deduced, had no idea but that evidence is admissible : and it is stated by the writers upon the Civil Law, that the legacies shall be accumulative, if by two instruments, unless the executor can shew evidence to the contrary. If it is taken as a rule of this Court, it would be a violation of it to admit evidence to raise a presumption against it. I should therefore, if it is taken as a rule in this Court, be very unwilling to let in evidence against it, first for the executor. It was taken for granted in many cases, and even in *Hooley v. Hatton*, that it would be admissible ; and in *James v. Semmings* ; it seems from one passage in the report, as if the Court doubted, whether parol evidence would not have been admissible ; *though the determination was upon the instruments themselves, that they were not accumulative. I will say no more upon the point as to the admissibility of the evidence ; only desiring to be understood not to give any opinion upon it whatsoever.

The question then is to be considered upon the will and codicil, taken together. First, this is the case of father and child ; and I must conceive, unless the Court has been erroneous in establishing the rule of presuming against double portions, that is a very material ingredient. Upon the will it is clear, that was the provision the testator thought sufficient for his only then younger child and any after-born children he might have. This being his intention, and his object to provide for his younger children, he soon after by a codicil gave to his son far short of what he had given him by the will, but a considerable addition to it : viz., his money in the funds. It seems then to have been his intention to give his son that in addition ; leaving the will to operate as to the legacy. Afterwards thinking, he might not have sufficient, or, perhaps, that he had not so certainly secured that provision to his son, as might be, he creates a trust ; which is only giving a real and specific security for the same portion :

† 1 Br. C. C. 390 n.

‡ 2 H. Black. 213 ; 3 R. B. 362.

but having done that, and another child being born, he immediately recurs to his will; and to put an end to any doubt, whether that should be in addition, he makes a codicil, reciting, that he had otherwise sufficiently provided for his son, which was only by that charge, and revoking the legacy to him by the will; thereby declaring it not to be his intention, that his son should have the provision by the charge and also the legacy; meaning, that 10,000*l.* should be his only portion with that small addition by the prior codicil; and then he gives the sum of 10,000*l.* to his daughter by name.

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It is said, this is a gift to the same person of the same sum in two separate instruments; and therefore *ex necessitate* it is an accumulation: but if I read this right, it is neither more nor less, than giving the portion to his daughter, as *persona designata*: she having come into existence after the execution, and not being mentioned in it *nominatim*, but being merely included in the description of after-born children. It is asked, why he did not revoke the legacy to her. He did not mean it. He intended that legacy to stand. Whether he took a wise way to put it out of *doubt is another question; which is sufficiently answered by the argument it has occasioned. But we must consider, what might have been floating in his mind. It might, as has been suggested at the bar, occur to him, that it might mean children born after his death; and possibly that is the sense, in which he meant it; and knowing, how critical lawyers are upon words, and thinking it necessary to guard against such a construction, he took that course, with a view to put it out of doubt. I will put this case; and no one can doubt upon it. Suppose, a testator by a will made before his marriage gave to any woman he might afterwards marry 2,000*l.* a year by way of jointure; that afterwards he married; and then by a codicil gave his wife the same jointure: could it possibly be intended, she should have two jointures? This is almost exactly the same case. There are two provisions. I am not determining, and will not say, whether upon two provisions, one by will, the other by codicil, without the circumstances that exist in this case, the rule would or would not attach: but it would be going too far to permit this rule to operate, when I am satisfied to the contrary;

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and that there is sufficient ground to say, the testator only meant a gift to his daughter by name of the same provision he before made for her as one of his younger children. The counsel for the plaintiff, aware of the difficulty, that might be thrown in the way, asked, whether it is a revocation or a substitution. In the first case, as the legatee would lose the benefit of the charge upon the real estate, that difficulty would arise, if I should consider this either as a revocation or a substitution. But according to my idea it is neither the one nor the other ; but only a declaration, that the plaintiff should have the same legacy as was given by the will to his after-born children. * * *

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All the judges, before whom this question has been, have decided, that small circumstances will raise an inference against this accumulation. This case, I think, affords a sufficient ground. Therefore, I am satisfied in declaring, that upon this will and codicil the plaintiff is entitled only to one legacy of 10,000*l.* ; but it shall be particularly mentioned in the decree, that evidence was offered, and not read, without prejudice to the question, whether it is admissible, or not.

The decree stated, that, an objection having been taken for the plaintiff to reading the depositions of the Duchess of Leeds and George Brooks, Esq. in order to prove, that the Duke of Leeds did not intend to give the plaintiff under the description of an after-born child a legacy of 10,000*l.* by his will and a like legacy by his codicil, dated the 14th of April, 1798, which was offered by the defendant, the eldest son and sole executor of the testator, without hearing the said evidence read, but without prejudice to the question as to the admissibility thereof, the Court declared, that upon the true construction of the will and codicil, dated the 14th of April, 1798, the plaintiff is not entitled to the provision of 10,000*l.*, given by testator's will to each of his after-born children, and also to the legacy of 10,000*l.* given to her by the codicil, dated the 14th of April, 1798.

The decree directed the accounts to be taken ; and that, in case the personal estate shall not be sufficient for payment of the debts, funeral expenses and legacies, any of the parties are to be at liberty to apply.

HOLLOWAY v. HOLLOWAY.†

(5 Vesey, 399—404.)

1800.

May 20, 29.

Rolls Court.
ARDEN, M.R.

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Testator bequeathed 5,000*l.* in trust for his daughter A. for life, and after her decease for such child or children, as she shall leave at her decease, in such shares as she should think proper; and in case she shall die, leaving no child (which was the event), then as to 1,000*l.* for her executors, administrators, or assigns; and as to the remaining 4,000*l.* in trust for such person or persons "as shall be my heir or heirs at law."

The 4,000*l.* vested in A. and the other two daughters of the testator, being his co-heiresses at law and next of kin at his death.

If that union of characters had not occurred, *Quære*, whether the next of kin could not claim. Upon this point see *Smith v. Butcher* (1878) 10 Ch. D. 113.

EDWARD REEVES by a codicil, dated the 21st of July, 1768, gave to trustees the sum of 5000*l.*: in trust to put the same out at interest on Government or other securities, and to pay the interest, income and produce thereof to his daughter Hindes for and during the term of her natural life, separate and apart from her husband. The codicil then proceeded thus:

"And after the decease of my said daughter Hindes then upon this farther trust, that they, the said Augustine Batt and Benjamin Holloway, their executors or administrators, do pay the said 5,000*l.* unto such child or children of my said daughter Hindes as she shall leave at the time of her decease in such shares and proportions as she shall think proper to give the same; and in case she shall die leaving no child, then as to 1,000*l.*, part of the said 5,000*l.*, in trust for the executors, administrators or assigns, of my said daughter Hindes; and as to the 4,000*l.* remainder of the said 5,000*l.*, in trust for such person or persons as shall be my heir or heirs at law."

The testator died in 1767; leaving his daughter Susannah Hindes and two other daughters his co-heiresses at law and his next of kin at the time of his death. Susannah Hindes having survived her husband died without issue in August, 1798.

The bill was filed by the great grandchildren of the testator by his two other daughters, the plaintiffs being his co-heirs at law at the death of Susannah Hindes, against the representatives of

† *Mortimer v. Slater* (1877) 7 Ch. D. 322, 47 L. J. Ch. 134.

HOLLOWAY v. HOLLOWAY. the surviving trustee, and against several other persons, who with the plaintiffs were the next of kin of the testator and of Susannah Hindes; praying, that the plaintiffs, as co-heirs of the testator at the death of Susannah Hindes, may be declared entitled to the said 4,000*l.*, &c.; or in case the Court shall be of opinion, that any other construction ought to be put upon such bequest, then that the rights of the plaintiffs and defendants may be declared, &c.

Mr. Richards, for the plaintiffs :

[*400] The construction upon this codicil must be, that the testator meant his heirs at law at the death of his daughter Susannah Hindes. He meant the description *of persons, that are in law the heirs; having before given to executors, administrators, &c. Mrs. Hindes must be necessarily known to be likely to be one of his heirs at law; and he gives this sum of 5,000*l.* to her for life in contemplation of her surviving him; and it is clear, he did not intend, she should take anything more than what he gave her expressly. He could not therefore mean, that his own heirs at law at the time of his death should take; knowing, that daughter would be one. He knew how to give to executors, administrators and assigns: then giving this sum of 4,000*l.* in other words he gives it to those, to whom common usage and the law affixes the meaning of heirs at law.

Mr. Martin, for the personal representatives of Benjamin Holloway, a grandson of the testator :

Contended, that the testator did not mean to confine it to heirs living at the death of the person entitled for life; but intended his own heirs generally.

Mr. Romilly and *Mr. Bell*, for the next of kin of the testator :

No case can be found at all applicable to this. The testator did not mean to give this sum of 4,000*l.* to any person by description: but the Court must understand him to mean, that it shall go, as the law would give it. The construction must be, first, that he meant next of kin: secondly, the next of kin at the

death of the person entitled for life. Speaking of a particular species of property he must be taken to mean heirs with reference to that property. Suppose, he had said "heirs at law of his personal estate," they could not take it with that descendible quality real estate would have. The only way to effectuate the intention is to suppose him speaking of persons existing at the time the fund becomes distributable; and then it means those persons, who shall be heirs at law (speaking inaccurately) of his personal estate.

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There are many cases, proving, that it must mean persons at the death of the person entitled for life. The excepted cases are cases of children; in which the time has been referred to the period, when they want the portion; not, when it becomes distributable: which is the general construction; for wherever there is no other gift except the distribution at a particular time, it means persons answering the description at that time. Here *there are no words of gift speaking to any particular time except the death of Susannah Hindes.

[*401]

Mr. Richards, in reply:

The whole frame of this will is providing for persons, that shall be living at the death of Mrs. Hindes. As to the 1,000*l.* it was in the testator's contemplation that it should be paid after her death to some persons representing her. From that there is a fair inference, that the other sum was to be given to some person, who should be living at that time; and it is impossible to contend, that he meant her to take it as one of his heirs at law. He knew how to give it to her, if he meant it. It cannot be supposed, he meant she should take any thing under this disposition of the 4,000*l.* Whoever takes it must take by the bequest. It is not as the law gives it. "Heirs at law" are words of a distinct meaning; and as good a description as "next of kin." The natural sense of the words does not apply to next of kin. * * *

MASTER OF THE ROLLS:

May 29.

This question arises upon a very doubtful clause in this codicil. Unquestionably it is competent to a testator, if he thinks fit, to

HOLLOWAY limit any interest to such persons as shall at a particular time
 v.
 HOLLOWAY. named by him sustain a particular character. The only question is, whether upon the true construction of this codicil it must necessarily be intended, he did not mean by these words what the law *primâ facie* would, strictly speaking, intend, heirs at law at the time of his death. A testator certainly may by words properly adapted shew, that by such words *persona designata*, answering a given character at a given time, is intended. But *primâ facie* these words must be understood in their legal sense, unless by the context or by express words they plainly appear to be intended otherwise. In this case these words are not necessarily confined to any particular time: nor from the nature of the gift is there any necessary inference, that it should not mean, what the law would take it to mean, heirs at the death of the testator. It is not like the case of *Long v. Blackall*.† The words there put it out of *the power of the Court to put upon it any other interpretation; though it was much contended, that it meant at the death of the testator. In that case the word “then” plainly proved, that the personal representatives at the time of the death were not intended; and if that word had not occurred, there was a great deal to shew, it could not be the intention (and that applies here); for there the wife was his executrix and it would have been a strange, circuitous, way of giving it to her.

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In *Bridge v. Abbot* † and *Evans v. Charles* § a great deal of discussion took place upon such words as these. In the first of these cases it was contended, and I had for some time little doubt upon it, that it was intended to give a vested interest to a party, who was dead before: but from the absurdity of that and of letting it be transmissible from a person, in whom it never vested, I was of opinion, that upon the true construction it must have been intended such persons as at the death of the testatrix would, if John Webb had then died, have been his personal representatives. I wish to add a few words to the Report of that case, to shew, what the decree was. The Report states, that I declared the persons entitled as legal representatives to be the persons, who would have been entitled as next of kin to John Webb at the death of Mary King. I desire that these words

+ 4 R. R. 73; 3 Ves. 486.

† 3 Br. C. C. 224.

§ 1 Anstr. 128.

may be added: "in case he had at that time died intestate." I believe, those words were added in the decree.

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The case of *Evans v. Charles* arose upon similar words, but under very dissimilar circumstances. Lord Chief Baron EYRE observes upon *Bridge v. Abbot*; and though the decision of the Court was different from mine, they seem to think my opinion right in that case. *Evans v. Charles* was determined upon other grounds; upon which the Court of Exchequer felt themselves obliged to give to the administratrix of the creditor. There is certainly an obvious distinction between them. It was truly said in *Evans v. Charles*, that it must always be taken together with the context. The words must have their legal meaning, unless clearly intended otherwise. In this case I was struck with the circumstance of the gift to the daughter for life, &c.; giving it to the heirs at law; of whom she would be one. But that alone would not, I apprehend, *be sufficient to control the legal meaning of the words. If an estate for life was devised to one, and after his death to the right heirs of the testator, it never would be held, that, though the tenant for life was one of the heirs, that would reduce him to an estate for life: but he would take a fee.

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Long v. Blackall has that very leading distinction from this case upon the word "then;" that there could be no doubt personal representatives at a given time were intended. I must therefore hold, that, if that word had not occurred, the judgment of the LORD CHANCELLOR would not have been such as it was; but, as it is, I perfectly concur in that judgment, together with the argument from the circumstances.

In this case I cannot upon that ground alone, that the daughter named in the will was one of the heirs at law, hold, that heirs at a particular time were intended. My opinion is, that there is not enough in this will to give the words any other than their *primâ facie* construction: heirs at law at his own death. If so, it would be a vested interest in the persons answering that description at his own death. I have not put this construction upon it in order to avoid the difficulty, that would otherwise arise: but I am very glad, that this relieves me from the necessity of stating, who are meant by the words "heirs at law"

HOLLOWAY as to the property, which is the subject of this bequest. This is
^{v.}
HOLLOWAY. personal property; and it is said, that though “heirs, &c.” have
a definite sense as to real estate, yet as to personal estate it must
mean such person as the law points out to succeed to personal
property. I am much inclined to think so. If personal property
was given to a man and his heirs, it would go to his executors.
I rather think, if I was under the necessity of deciding this point,
I must hold it heirs *quoad* the property: that is, next of kin:
but I am relieved from that; as, if heirs at his death are meant,
they are the same persons: the three daughters being both heirs
and next of kin; and if they did not take as heirs at law, they
took an absolute interest in themselves in the personal estate.
Great difficulties would arise from the construction, that heirs at
law are intended, and applying it to personal property. He
might have different heirs at law: heirs descending from himself
as first purchaser: heirs *ex parte paternâ* and *ex parte maternâ*.
[*404] I *am inclined to think, the Court would in such a case consider
him as the first purchaser; so as to take in both lines. However
there is no occasion to say any thing upon that.

Declare, that the words “heir or heirs at law” in this will
must be taken to mean heir or heirs at law at the time of the
testator’s death; and that the sum of 4,000*l.* vested in his three
daughters.

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(5 Vesey, 404—423.)

Devise of real estates to trustees and their heirs, upon trust to convey upon certain trusts; and, subject thereto, to several natural sons successively in strict settlement. The testator also gave the residue of his personal estate upon trust to be laid out in land, to be settled to the same uses, &c. A codicil revoking so much of the will as directed the settlement of his said estate upon his sons, and varying the order of the limitations, was considered as operating by way of substitution only, and not as indicating any sufficient intention to sever the union of the residuary personal estate with the devised real estate.

Testator by codicil revoked the legacy of 50*l.* bequeathed to his sister. The only legacy given to her was 100*l.* given by the will. The effect of the codicil considered.

1800.
May 23, 24,
30,
ARDEN, M.R.
for the
LORD CHAN-
CELLOR.
[404]

RENÉ PAYNE by his will, dated the 23rd of October, 1792, and attested by three witnesses, gave and devised all his manors, messuages, lands, tenements, hereditaments, and real estate, whatsoever and wheresoever, unto and to the use of Robert Smith, Samuel Smith, and Vicary Gibbs, Esqrs., their heirs and assigns, upon trust and to and for the intents and purposes after declared of and concerning the same: that is to say; as for and concerning all such tenements and hereditaments, as were vested in him in fee as a trustee or mortgagee, upon the same trusts; and as for and concerning all and every other his manors, messuages, lands, tenements, hereditaments, and real estates, whatsoever and wheresoever; upon trust, as soon as conveniently may be after his decease, to convey the same in such manner, that the same shall stand limited in the first place to his said trustees for the term of ninety-nine years without impeachment of waste; and, subject thereto, as to the whole or competent parts of the same hereditaments and premises, to the intent that John Pearce may receive the annual sum or rent-charge of 300*l.* during his natural life; with all usual powers of distress and entry; and, subject to the said term and charged with the said rent-charge, to Edward Pearce for life, without impeachment of waste; remainder to trustees, to preserve contingent remainders;

† *Bridges v. Strachan* (1878) 8 Ch. D. 558; *Dallas v. Towry* (1888) 41 Ch. D. 64, 58 L. J. Ch. 593.

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*remainder to his first and other sons in tail male; remainder to William Pearce and his first and other sons in the same manner; remainder to George Pearce and his first and other sons in the same manner; remainder as a reversion in fee to the testator's youngest brother and his heirs.

The trusts of the term were declared to be, as to the several hereditaments and premises therein to be comprised, which shall be charged with the said rent-charge, for better securing the same; and as to the said hereditaments and premises, which shall be so charged, subject thereto, and also as to all and singular other the hereditaments and premises, so to be comprised in the said term, "that they my said trustees, shall and do collect the rents, issues, and profits, of my said estates, comprised in the said term of ninety-nine years, for and during all such time as the said Edward Pearce shall be under the age of twenty-five years, and also for and during all such time and times as such other person and persons as for the time being shall by virtue of this my will be entitled to a present estate of freehold or inheritance in the same premises shall be under the age of twenty-one years, and moreover for and during all such time and times as such other person and persons, as for the time being shall by virtue of this my will be entitled to a present estate for life only in the same premises, shall be under the age of twenty-five years; but no longer:" and out of such rents and profits to pay and apply from time to time for the maintenance and support of Edward Pearce, until he shall attain the age of twenty-five, 1,000*l.* per annum; and in case of his decease, then for the maintenance and support of such person and persons as for the time being shall be entitled by virtue of his will to a present estate of freehold and inheritance in the said premises, to be comprised in the said term, 800*l.* per annum until the age of twenty-one; and from that age, as to such as shall be entitled to a present estate for life only, 800*l.* per annum, until he or they respectively attain the age of twenty-five.

The will then directed, that all the rents and profits of his said estates, to be comprised in the said term, which shall be received by the trustees for such respective times as above-men-

tioned, and not applied in payment of the aforesaid annual sum, and in keeping the said hereditaments and premises in repair, shall be considered as a part of his personal estate, and be applied and disposed of as such. The will farther directed, that there should be inserted in such settlement to be made of his said estates, so to be comprised in the *said term, sufficient powers to enable Edward Pearce and the respective persons, who for the time being shall be entitled under his will to a present estate for life in his said tenements and hereditaments, so to be comprised in the said term, as aforesaid, to charge the same, but subject as aforesaid, by way of jointure, not to exceed 500*l.* per annum ; and also by deed or will to charge his said estates or any part thereof, so to be comprised in the said term, for portions for younger children, not exceeding 5,000*l.*, if but one ; 8,000*l.*, if two ; and 10,000*l.*, if three or more ; also with power to Edward Pearce and the respective persons, who for the time being shall by virtue of his will be entitled to a present estate for life in his said hereditaments, so to be comprised in the said term, as aforesaid, and his trustees during the minority of the respective persons, who for the time being shall by virtue of his will be entitled to a present estate in tail, to grant leases. The testator also directed, that in such settlement to be made of his said estates there be inserted a sufficient power to enable his said trustees, if they shall think proper, to make sale of all or any part of his real estate in the county of Hertford ; and he declared his will, that the money to arise by such sale or sales shall be applied and disposed of in like manner as the clear residue of his personal estate is by his will directed to be applied. He then directed, that in such settlement to be made, as aforesaid, shall be contained conditions to oblige the respective persons, who for the time being shall be entitled to a present estate of inheritance in his said real estate, to be comprised in the said term, to take the surname of Payne.

The testator then gave to Martha Pearce all his household goods, furniture, &c., and effects, of what nature or kind soever, except securities for money or stock in trade in or about his houses in London and Hertfordshire. He gave to his executors 20,000*l.*, upon trust to place it out upon government or real

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securities, upon trust for Martha Pearce for life; and after her decease to transfer to such one or more of John Pearce, William Pearce, and George Pearce, or such child or children of them or either of them, as she should appoint; and, in default of appointment, equally between John, William, and George. He also gave 5,000*l.* to John Pearce. He *gave 10,000*l.* to his executors, upon trust to place the same out in government or real securities, upon trust to pay or allow for the maintenance and education of William Pearce, until he shall attain the age of twenty-one, such yearly or other sum or sums of money, as they or the survivor, his executors, &c., shall think proper: the surplus to accumulate for the person or persons entitled to the capital; with power to apply any part of the capital for the advancement of William Pearce; and the principal to be transferred to him at the age of twenty-one; and a similar legacy, with the same direction for maintenance and accumulation, was given for the benefit of George Pearce; with survivorship between them. He gave an annuity of 100*l.* a year to Mrs. Elizabeth Woodford during her life; and the following legacies, among others: 500*l.* to each of his executors; “and to Mrs. Elizabeth Payne my mother Mrs. Elizabeth Payne my sister John Payne, Esq. and Edward Payne, Esq. my brother one hundred pounds each.” The will then proceeded thus:

“And as to all the rest and residue of my personal estate of what nature or kind soever, and the surplus rents, issues, and profits, of my said real estates, so declared to be taken as a part of my personal estate, as aforesaid, after payment of my debts, funeral expenses, and legacies, I direct, that the same shall from time to time, as convenient purchases shall offer, be laid out and invested in the purchase of real estates of inheritance in fee-simple; and that the estates so to be purchased shall from time to time be settled to such uses, upon such trusts, and in such and the like manner, as I have herein before directed respecting my real estates directed to be comprised in the said term of ninety-nine years, or as near thereto as the deaths of parties and other circumstances will then admit of or render necessary, and in the mean time, until such purchase or purchases shall offer, my will is, and

I do direct, that such rest and residue of my said personal estate shall be laid out upon good real or government security at interest in the names of my said executors; and that the interest and dividends of the securities, wherein the same shall be invested, shall be paid and applied to such person or persons, and in like manner, as and to whom the rents and profits of my said real estates are by this my will, *and the settlement to be made in pursuance thereof, directed to be paid and applied."

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The testator then appointed his three trustees executors; and farther directed, that in the settlement to be made of his said real estate, as aforesaid, should be inserted all usual clauses, powers, &c.

By a codicil, dated the 24th of January, 1797, also duly executed to pass real estate, the testator reciting, that he had by his will given and devised all his manors, messuages, lands, tenements, hereditaments, and real estates, whatsoever and wheresoever, unto and to the use of Robert Smith, Samuel Smith, and Vicary Gibbs, upon certain trusts, and giving them certain sums of money, to be laid out and invested in their names upon certain trusts, and appointed them executors; and upon farther consideration it appeared to him, that the aforesaid trust and executorship may take up too much of the time, and break in upon Robert and Samuel Smith in their own weighty affairs and concerns; therefore he determined to leave them out and appoint Joseph Nutt joint executor and trustee with Vicary Gibbs; he revoked so much of the will as respected the appointment of Robert and Samuel Smith as trustees and executors; and constituted Joseph Nutt and Vicary Gibbs trustees and executors; and he gave and devised all his manors, messuages, lands, hereditaments, and real estates, by his said will devised to Robert Smith, Samuel Smith and Vicary Gibbs, to Vicary Gibbs and Joseph Nutt and their heirs, upon the trusts and to and for the same intents and purposes as the same hereditaments and premises are given and devised by the will; and he gave them all such sums of money, as are by his said will given to Robert and Samuel Smith and Vicary Gibbs, upon the same trusts, intents, and

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purposes, as are by the will declared concerning the same; and he substituted legacies of 50*l.* each for Robert and Samuel Smith for the legacies given to them by the will; and gave Nutt a legacy of 500*l.* He directed the annual sum or rent-charge of 500*l.* to be limited and charged upon his said estates for John Pearce during his life, instead of the annual sum of 300*l.*, by his will directed to be charged upon his said estates for him. He gave and devised to Gibbs and Nutt, and their heirs, a messuage lately erected by him at Sulby and the appurtenances, and all and every the messuages, lands, hereditaments and real estate, purchased by him since making his will, upon trust as to the house, &c., at Sulby and ten acres for Martha Pearce for ninety-nine years, if she shall so long live and continue unmarried; and as to all and every other the *messuages, lands, hereditaments, and real estates, &c., and the said house, &c., at Sulby, after the determination of the term, to settle the same in the same manner as by the will is directed concerning his manors and real estates thereby devised and given. Then, after giving an annuity and some legacies, in all other respects the testator ratifies the will.

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The testator made the following memorandum;

“Memorandum January 25th 1797 to be considered and taken as a codicil to my will. The Mrs. Elizabeth Woodford of Wilford in Northamptonshire to whom by my will I have bequeathed an annuity of one hundred pounds per annum during her life was the widow of the late Mr. John Woodford of Wilford and is since dead; consequently the legacy is lapsed. I hereby annul and make void the legacy of fifty pounds bequeathed to my sister Elizabeth Payne.”

This paper then gave two small legacies.

By a third codicil, dated the 30th of November, 1797, and attested by three witnesses, reciting, that he had by his will directed his trustees as soon as conveniently may be after his decease to convey, settle, and assure “my manors, messuages, lands, tenements, and hereditaments, and real estates therein mentioned; and in the settlement by my said will directed to be made of my said estates I directed, that the same estates should be limited after the determination of the preceding

estates thereby directed to be limited and failure of issue male of Edward Pearce to the use of William Pearce for life, &c.

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The codicil then, after stating the limitations in the will, proceeded thus :

“ Now I do hereby revoke so much of my said will as directs the settlement of my said estates to the said William Pearce for life and all the subsequent limitations ; and instead thereof do direct, that in and by the settlement to be made of my said estate, as aforesaid, the same estates to be limited from and after the decease of the *said Edward Pearce and failure of issue male of his body to the following uses : that is to say, to the use of the said George Pearce ” for life without impeachment of waste ; remainder to trustees to preserve contingent remainders, remainder to his first and other sons in tail male ; remainder in the same manner to John Pearce for life and his first and other sons, and then to William Pearce and his first and other sons, in tail male successively, with the ultimate remainder as a reversion to the testator’s youngest brother Edward Payne and his heirs. The testator farther directed, that all and every powers by his said will directed to be inserted in the aforesaid settlement of his said estates, should be inserted so as to operate in favour of the several persons aforesaid, according to the limitation hereby directed to be made of his said estates ; and he gave and devised the estates purchased by him since the making his will to his trustees and their heirs, to be conveyed and settled in like manner, as by his will and this codicil is directed concerning the estates by his said will devised to them. In addition to 5,000*l.* given by the will he gave John Pearce 1,000*l.*, to be paid him within two months after the testator’s decease.

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The fourth codicil was not signed by the testator, or any witnesses ; though there was a regular clause of attestation ; and the blank for the date was not filled up. The Ecclesiastical Court however granted probate of this paper. It was very similar to the third codicil : the testator reciting and revoking the limitations of his will in nearly the same manner ; but placing William Pearce and his issue next in remainder to

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George, and before John. The testator also cancelled a debt due to him.†

Edward Pearce the testator's eldest natural son, died without issue in the life of the testator. The testator died in April, 1799, unmarried; leaving his three surviving natural children, William Pearce, George Pearce and John Pearce; and leaving his eldest brother John Payne his heir at law. Mr. Gibbs and Mr. Nutt renounced the executorship, and Robert Smith now Lord Carrington, took out administration with the will annexed.

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The bill was filed by Lord Carrington, and by George Pearce, who had taken the name of Payne; praying, that the will and codicils may be established, &c. The principal question arose with respect to the fund directed by the will to be laid out in real *estate; whether the third codicil, which in the direction of the limitations postponed William to his younger brothers, extended to that fund. It was also claimed by the next of kin of the testator as undisposed of; upon the ground that the will, with respect to the uses of the real estate, according to which the estates to be purchased with that fund were directed to be settled, were revoked by the first and third codicils; and no disposition of the residue of the personal estate being afterwards made.

Another question arose upon the legacy claimed by the testator's sister Elizabeth Payne. The only legacy given to her was 100*l.* given by the will; and the second codicil annulled and made void the legacy of 50*l.* bequeathed to her.

A third point was made; whether, one of the witnesses to the will being abroad, in Jamaica, it was necessary to send out a commission to examine him. His hand-writing was proved; and the other two witnesses were examined.

The MASTER OF THE ROLLS held, that it was not necessary to have his examination; but it was the same as if he was dead; observing, that the heir at law did not make a point of it; but submitted it to the Court; and in Mr. Fitzherbert's

† The MASTER OF THE ROLLS expressed his dissatisfaction at the probate of this paper.

case,† one of the witnesses being in India, it was held not necessary, but very dangerous, to send the original will abroad.

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The *Attorney-General*, Mr. Mansfield, Mr. Steele, and Mr. Sutton, for the plaintiff George Payne :

The words "real estate" are used by this testator as a comprehensive term, referring to the compound mass, which he meant to go according to the limitations he has directed. The clear intention of the first codicil was to substitute Nutt as a trustee; and that the trustees should take the property directed to be laid in land as well as the lands themselves. There is no express direction as to the residue of his personal estate: but it is manifest, that Gibbs and Nutt were to be the trustees to lay out that residue.

In *Darley v. Langworthy*‡ the decision was only, that the revocation of the disposition of the real estate was not a consequential *revocation of the disposition of the personal estate. That case is different from this in one very material respect: that revocation consisted simply in the deviser's having done an act, the effect of which was to take from him the estate he had before, and to give him a new estate; upon which by law the will he had executed could not operate. It was therefore a legal revocation. The intention had nothing to do with that question; which was simply, whether the deviser had at his death that estate, which he had devised; and therefore, whether the will could operate upon it. Lord CAMDEN considered the personal estate to be so attached to the real, that it must fall with that: but the House of Lords reversed that decree. The point did not in the least depend upon the intention. That case also occasioned great doubt in Westminster Hall.

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In this case the question is simply, whether by the codicil the testator meant to separate his real and personal estates; that they should go different ways; to separate the rents and profits and the money to be produced from his Hertfordshire estate; and to make a different disposition of it, if sold, from that, which should take place, if not sold; and that the personal

† *Fitzherbert v. Fitzherbert*, 4 Br. C. C. 231.

‡ Amb. 653

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estate should go one way, if laid out in the purchase of land and the real estate should go another way. * * *

[They also cited *Lord Sydney Beauclerk v. Mead.*†]

[414] The *Solicitor-General*, Mr. Piggott, and Mr. Romilly, for the defendant William Payne :

This is a question of revocation, not of original devise. The right is clear upon the face of the will. They must shew, how much is taken from William Payne by any subsequent instrument, either by express words or manifest intention.

[416] * * * The circumstances of *Darley v. Langworthy* were infinitely stronger. The limitation of the leasehold estate was to be to the same uses. The two cases stand upon the same ground ; and if in this the construction is to be different, it must always depend upon the mode. As to the alleged intention, where is the absurdity in giving George the real estates he had at the date of the will and those purchased between the dates of the will and codicil, and not taking from William the estates to be purchased with this fund. He provided maintenance for both of them. The safest course is to stand upon the words ; unless the intention is demonstrated. It must not be forgot, that this defendant does not seek to acquire an estate through a construction : but the plaintiff seeks through a construction to take away an estate expressly given to the defendant.

[417] Mr. Lloyd, Mr. Richards, Mr. King, and Mr. Leach for the next of kin :

There is nothing but inference to support the claim of this personal fund as real estate : the uses of the will being revoked ; and no disposition of the personal estate being made afterwards. * * Therefore the next of kin are entitled.

The *Attorney-General*, in reply :

With respect to the claim of the next of kin, if money is directed absolutely to be laid out in land, and it is to have effect to any purpose, the ultimate limitation must be to the heir at law ; and the next of kin have no title. * * *

The general impression on this testator's mind was to devise the real estates he had in this manner, so as completely to disinherit his heir at law in favour of his natural children, and to give the ultimate remainder in fee to his younger brother. It certainly was *his intention, that so much of his personal estate as should not be exhausted by particular dispositions should be laid out in land, to be settled in the same way; and that intention to give all this property both real and personal in the same way, clearly continued. * * *

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The MASTER OF THE ROLLS having stated the case delivered the following judgment :

May 30.

The real and personal estates are by the will united, and made into one settlement; by which these persons are to take in the course of succession marked out. Upon the first codicil some question arises; but none, that is material, in the view I have of this case. The question upon that codicil is, whether the words "sums of money" therein contained are sufficient to comprise the personal estate, or are confined to the sums of money specifically mentioned in the will. The principal object of the codicil was to devise estates purchased after the date of the will to the same uses. Upon the disposition by that codicil of all such sums of money as are by his will given to his trustees, upon the same trusts, it was contended on one hand, that these words were not intended to comprehend all his personal estate comprised in the will: but relate solely to such sums of money as the testator had ordered to be invested in the names of trustees, for the particular trusts mentioned in the will. That argument is founded upon the idea, that as he had by the will expressly mentioned his personal estate, and given directions concerning that, as well as concerning his real estate, and by the codicil revoking the devise as to the real estates, and saying nothing as to his personal estate, it must be intended, he did not mean to advert to his personal estate at all. Upon the view I have of this case that criticism upon this first codicil is of no great consequence. I am rather inclined to think it was intended by those words to comprehend all the personal estate: but upon my *opinion of the case it is not material to determine

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that; for if those words did comprehend all, they were inserted, in order to give it to the same trustees, who took the other property; and, as I think, that codicil only changed the trustees, and gave the estates purchased after the execution of the will to the same uses, it is of no consequence to determine that point as to the extent of those words.

The third codicil, upon which the question arises, revokes the limitations of the will; and substitutes George for William, John for George; and puts William the last in the intail; with the like remainder to the testator's brother in pretty nearly the same words. The codicil then goes on to direct the same powers to be inserted in the settlement of his said estates, and to direct estates purchased since the execution of the will to be settled in the same manner. It was contended on one hand, that upon the true construction of the will and the third codicil the testator must be held to have revoked the devise, so far as respects the real estate; by which I mean the estates of which he was seised at his death; and to have made other limitations instead of them; but that he left the estates to be purchased with the personal estate to go to the same persons, and in the same order, as by the will he had given the real estate; and the words of the codicil are criticised, in order to shew, that they cannot mean the estates directed to be purchased; and for that the case of *Lord Sidney Beauchlerk v. Mead*† was relied on. That case is in some circumstances analogous to this; and, when it was first mentioned, I thought, that case and *Darley v. Langworthy*‡ bore much upon it; but upon very full consideration I think myself relieved from the necessity of entering into many of the arguments upon these two cases; for I think they are perfectly different; and the questions, that arose in them, are not the questions that will govern this decision. It was said, that, when one species of property is devised in a particular manner, and in the same will another species of property is declared to be annexed to it, as it was in the case of *Darley v. Langworthy*,‡ or, where it is given to the same persons as the other estates, and by act of law or by codicil the disposition of the former is revoked or altered, the latter shall not be revoked or altered

† 2 Atk. 167.

‡ Amb. 653.

unless it is manifest, the testator intended to affect that. I am willing for the sake of argument to admit this: but it does not in any way affect this case. I admit, the testator does not by these words include *the lands to be purchased; and if by the will he had given to certain persons the lands he was seised of, and had by that will directed his personal estate to be laid out in land for the benefit of the same persons, to whom the real estate was devised; and by a codicil he had given the estates, of which he was seised, to different persons, and in a different manner, and had used no words applicable to the personal estate, the codicil might upon those two cases have the effect of disuniting them; and the personal estate would have gone to the same persons, as if the codicil had never been made. That is the effect of *Lord Sidney Beauclerk v. Mead*. It was argued, that the codicil in this case does not include the personal property to be laid out in land; and then considering the codicil as a revocation of the devise of the real estate, as it is silent with respect to the personal estate, that must upon the authority of those two cases go exactly as if that codicil had not been executed.

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But none of these arguments apply to this case; for this codicil does not revoke the devise of the real estate. It leaves the devise of the real estate to the trustees in full force. It does not in any degree disunite the estates to be purchased from the settlement to be made of the real estate. It is therefore fallacious to argue, that it was a revocation of the devise of the real estate at all. It remains devised to the trustees; and the only alteration is in the mode of succession to be directed in the settlement to be made. The will directed a settlement to certain uses; and gave the personal estate, to be laid out in land, to be settled to the same uses. Upon the first codicil it is not contended, that any alteration was made in the settlement of the testator's real estates, or those to be purchased. That codicil did nothing more than change the trustees, and devise the estates purchased after the execution of the will to the same uses. Therefore upon that codicil the real and personal estates are united; and are to be conveyed to the same uses, by the same trustees; and so it stood, when the third codicil was made. By

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that codicil the testator revokes the limitations in his will as to the real estates, of which he was actually seised ; and limits new uses thereof ; and then upon the part of William, the second devisee in the will, Edward, the eldest son, having died after the third codicil was made, it was contended, that the uses of the estates directed to be purchased remained exactly as in the will. For the next of kin it was contended, that *the uses limited by the will having been revoked, and the personal estate not being afterwards disposed of, it is undisposed of ; and therefore they are entitled. I am of opinion, that neither the arguments for William Payne, nor those for the next of kin can prevail ; for the will is not revoked as to the union of the two species of estates. The codicil makes no alteration with regard to that union ; and though the testator makes use of the word “ revoke,” the will is not a revocation as to that union, but merely an alteration of the order of the limitations to be inserted in the settlement ; and it is no more than if the deviser with his own hand had inserted the name of George and John before William, and then republished his will. The codicil leaves the will in full force with regard to every thing not expressly or by necessary inference revoked or altered ; and I am clearly of opinion, that the settlement, as far as respects the union of the estates, remained in full force.

It is unnecessary to comment upon the two cases, that have been mentioned. If I was to argue upon this case, as Lord HARDWICKE did in the case before him, the arguments, that were urged for the plaintiff, are exceedingly strong. It was admitted, the devise to Edward will comprehend both the real and personal estates. The settlement to be made must be a settlement of both, in order to comprehend him. Certain powers are given to the tenant for life, affecting and riding over all those estates. Upon the construction of the defendant these estates must after the death of Edward be comprised in two separate settlements. The difficulties then are almost insurmountable. Are there to be double powers : or, are the powers to cease ? The power to sell the Hertfordshire estate, and many other arguments, very ably urged, and ably answered, I admit, are sufficient to shew, the testator meant to unite both the real estate, of which he was

seised, and the estates directed to be purchased; though, I admit, the words "my real estate" can apply only to those he had. But the ground, upon which I rest, is, that the will is not revoked by the codicil; which makes no alteration but in the order of limitation in the settlement to be made; and does not alter the devise. Suppose, another natural son had been born: and the testator had thought fit to interpose him after the others; and had used the expression, that he revoked the limitation to his brother; and directed a limitation to that son for *life, &c.; upon the same ground it might be contended, that totally revoked the disposition as to the estates to be purchased.

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With respect to the legacy to the testator's sister Elizabeth Payne, I do not know what to make of it. I can find nothing similar to it. The Court is to give effect to every word of a will, if they can. How do I know, he did not think, he had given two legacies of 50*l.* instead of 100*l.* But I am rather inclined to think, it is a mistake of the quantum of the legacy, and a demonstration of his intention to revoke the legacy given; thinking, he had given her a legacy of 50*l.*; and meaning to revoke that. I will consider of it.

The point as to the legacy does not appear in the decree to have been determined.

LONG v. LONG.†

(5 Vesey, 445—448.)

Under an antenuptial covenant to settle real estates in strict settlement with an indefinite power of charging sums for younger children. Held that a testamentary direction by the covenantor that the estate should be sold and the proceeds distributed between the children was a valid exercise of the power.

1800.
June 20.

LOUGH-
BOROUGH,
- L.C.

THE LORD CHANCELLOR said, This appointment is in substance exactly what he (the covenantor) had a right to do.

† See *Kenworthy v. Bate*, 6 R. R. 46 (6 Ves. 792).

1800.

July 5, 9.

Rolls Court.

ARDEN, M.B.

[465]

MILSOM v. AWDRY.†

(5 Vesey, 465—469.)

Residuary bequest to the testator's nephews and nieces *per stirpes* equally for their lives; and after the death of either that share of the principal to be paid equally to and among the children of such of his said nephews and nieces as should die; and if any die without leaving any child or children, that share to go to and among the survivors or survivor of them in manner aforesaid.

Upon the death of one without a child that share goes to the survivors for their respective lives only, and will pass to their children respectively with the original shares: but upon the death of the last survivor without a child his shares, both original and accrued, are undisposed of; notwithstanding another has left a child.

ISAAC MOODY by his will, dated the 9th of June, 1787, after giving a legacy of 200*l.* to his wife, gave to Awdry and Humphreys all the residue of his money and securities for money, goods, chattels, rights, credits, estate, and effects, which he was anywise entitled to, whether in possession or expectancy, in trust to pay and apply the same in manner following: viz. that they should in the first place pay thereout all his just debts and funeral expenses; and afterwards that they should place and continue the same out at interest upon Government or real securities, and the interest and increase thereof should pay and apply to and among his (testator's) nephews and nieces, sons and daughters of his late brothers and sister, Matthew, David, and Hannah, equally between them share and share alike for their lives: the children of such of them, his said brothers and sister, to have only their father's or mother's share between them; and from and after the death of either of his said nephews and nieces in trust to call in the share of the principal money, out of which the said interest was to be paid, and pay it equally unto and among the children of such of his said nephews and nieces as should happen to die; and if any of his said nephews and nieces should die without leaving any child or children, then the share or shares of him, her, or them, so dying should go to and among the survivors or survivor of them in manner aforesaid.

The testator died soon after the execution of his will. The

† *Re Bowman* (1889) 41 Ch. D. 525, 60 L. T. 888.

bill was filed by the assignees under a commission of bankruptcy issued against a person, who in 1792 purchased all the interest of Samuel Ovens under the will. A decree was made directing the accounts; and an inquiry, what nephews and nieces of the testator were living at his death; whether any and which are dead; and whether they left any and what issue.

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v.
AWDAY.

The Master's report stated the nephews and nieces of the testator and their issue. The testator's sister Hannah had married — Ovens; and had issue Jacob, who died first without issue; John, who died next leaving issue Jane Short; Samuel Ovens, living unmarried; and Hannah Coe, dead without issue.

The cause coming on for farther directions, the question was, whether the plaintiffs were entitled to the absolute interest in the shares accruing to Samuel Ovens by survivorship, or to an interest for his life only in those shares.

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Mr. Lloyd, and Mr. Romilly, for the plaintiffs:

The interest in these surviving shares is absolute and transmissible. Strong words would be necessary to restrain it to an interest for life. This is the gift of a residue. Therefore the testator cannot be supposed to mean to leave anything to be undisposed of.

Mr. Piggott, Mr. Martin, and Mr. Horne, for the defendants:

Samuel Ovens could take only an interest for life under the words "in manner aforesaid." Those words must be construed just as if the testator had repeated all the words he had used as to the original shares, applying them to the shares accruing by survivorship. They strike out these words; which will govern the whole of the preceding bequest. At least they must limit the interests accruing by survivorship; and as they cannot be claimed absolutely, the consequence, I admit, is, that there may be a partial intestacy.

MASTER OF THE ROLLS:

This is the case of a residue; therefore every intendment is to be made, that the testator meant to dispose out and out. I

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think the case so very doubtful, that I must consider farther. I have changed my opinion more than once.

July 9.

MASTER OF THE ROLLS :

This is one of the most difficult questions, that can occur : the construction of words, to which it is hardly possible to give any construction, which will not involve something like absurdity ; and it is impossible to put any construction upon them, which will not under certain circumstances be contrary to the testator's intention.

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The question upon this will is raised with respect to the interest of the children of the testator's sister ; who had four children. The first that died, was Jacob ; who died without issue. The question then is, in what manner his fourth was to go to the three survivors ; for John, who is since dead, did not die till afterwards. *The question is, whether upon the death of Jacob the accruing share went to the three survivors for their lives only, or absolutely. Since that John Ovens has died ; and he left issue : so that upon his own share there can be no doubt. Afterwards Hannah Coe died without issue ; and Samuel Ovens is now the only survivor ; in whose right the plaintiffs insist, that upon the death of any one of the nephews or nieces the share of that one survived to the others, not for their lives only, but absolutely. On the other hand it is contended, that upon the death of any one that share went to the survivors in the same manner as the original shares did : viz. for their lives only ; and I suppose it is admitted, that the share of each, both original and accruing, should likewise go to the issue, if any. It must have that effect. The only question in this cause then is, how the words " in manner aforesaid " are to be applied. I am bound to give those words the same construction. The true rule is to give every word a construction, if I can, without violating clear words in other parts of the will or the general intention. If the will, after the disposition, in case any of the nephews or nieces should die without leaving issue, to the survivors or survivor, had stopped there, it would have clearly passed the absolute interest : but I must see, whether I can refer the subsequent words to any preceding part of the will. If those

words mean only, that it is to be divided equally between them, they have no effect whatsoever. I cannot help saying, though it is but a conjecture, that the testator meant them to take that surviving share under the same terms, and subject to the same restrictions and limitations as the original share. That is the fairest construction ; and that which I ought to put upon this will. I cannot say, I have not had doubts upon it ; nor, that my opinion has not varied.

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AWDEY.

The next consideration is, whether this violates the general intention, as manifested in this will ; for that is the true way, in which we ought to construe such a will. See the effect of this. If I was to say what the testator meant, there can be no doubt, that if there were any children, they would have the whole fund after the death of the tenants for life ; and I have endeavoured to give this will that effect : but I cannot go so far as to give the words “survivors or survivor” so large a construction. I think there have been cases, in which those words have had a larger sense imputed to them than the words import ; as upon a gift to *children, when they attain the age of twenty-one or marry ; and if any die before the age of twenty-one or marriage without leaving issue, then to the survivors or survivor : one attains the age of twenty-one ; and dies : then another dies under twenty-one and unmarried ; and the words “survivors or survivor” have been considered the same as “others or other :” so that such as attain twenty-one should have vested interests. But in this case, when the testator speaks thus, I am obliged to give it to the survivors or survivor. The conclusion is, they shall take it as nearly as possible as the original shares ; viz. for their lives ; and after the death of any of those survivors as well the original as the accruing share would go to the child of that survivor. They are now reduced to one. If he dies, without leaving a child, there must be an intestacy upon this construction ; and yet there is issue of a deceased brother living. I wish extremely, that I could construe the words “survivors or survivor” to mean “others or other ;” so as to make them tenants in common with cross remainders. In the case of estates tail I could have made that construction, to let in the issue of John ; which would have been the most beneficial con-

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struction; and probably was the intention. I think, there is such a determination. But giving this absolutely would not solve the difficulty.

Declare, that upon the death of Jacob Ovens without issue one-third part of his fourth of a third went to John for his life; one other third to Samuel for his life; and the remaining third to Hannah for her life; and upon the death of John leaving issue his original share, together with the third share, which devolved upon him for life upon the death of his brother Jacob, belonging to Jane Short, his only child; and upon the death of Hannah Coe without issue her share, together with the third, that accrued to her upon the death of Jacob, belong to Samuel Ovens for his life; and in case he shall die, leaving issue, that issue will be entitled, as well to his original share, as to the shares that survived to him; and in case of his death without issue they will belong to the next of kin of the testator as undisposed of.

July 11.

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A few days afterwards the cause was mentioned again as to the costs; and the costs of Samuel Ovens were directed to be paid by the *plaintiffs; and the costs of the other party to be paid out of the fund in Court.

MASTER OF THE ROLLS:

I am very much inclined to give a larger interpretation to the words "survivors and survivor;" as Lord THURLOW was in *Ferguson v. Dunbar*,† and to hold, that, if there should be children of any, there would not be an intestacy: but I can go no farther; and am sorry for it. I cannot find the decree in *Ferguson v. Dunbar* in the Register's Book. There is only an adjournment of the cause; and the decree does not appear to have been entered.

BROWN v. HIGGS.

(5 Vesey, 495—508.)

For the report of this case see 4 R. R. 323.

† 3 Br. C. C. 469 n.

BOWLES *v.* ROUND.†

(5 Vesey, 508—509.)

A purchaser of land cannot resist specific performance on the ground that the property (a meadow) was sold without mention of the fact that there was a way round it, and a footpath across it, such easements being apparent.

1800.
July 19.LOUGH-
BOROUGH,
L.C.

[508]

THE object of the bill was to obtain specific performance of an agreement entered into by the defendant to purchase a meadow called Burnett's meadow, near Clewer, which was sold by auction to the defendant for 950*l.*

The principal objection made by the defendant was that the premises were described as a meadow consisting of fifteen acres, without any notice of a way round and a foot-path across it.

The way round the field was stated by the answer to be a public road, but upon the evidence it appeared to be only a foot-path, and the answer stated that the defendant was owner of a house and ground adjoining. * * *

The *Attorney-General*, and *Mr. Thompson*, for the plaintiff pressed for a decree with costs.

The *Solicitor-General* for the defendant, observed upon the variance from the description, and the disadvantage arising from this way ; which by length of time had become very wide.

[509]

LORD CHANCELLOR :

Certainly the meadow is very much the worse for a road going through it : but I cannot help the carelessness of the purchaser ; who does not choose to inquire. It is not a latent defect.

Decree according to the prayer of the bill with costs.

† This case is sometimes cited and referred to as *Oldfield v. Round*.—O.A.S.

1800.
July 30.

LOUGH-
BOROUGH,
L.C.

[530]

CARTWRIGHT v. VAWDRY.†

(5 Vesey, 530—534.)

An illegitimate child not entitled to share under a devise to children, generally; notwithstanding a strong implication upon the will in favour of that child.

THOMAS CARTWRIGHT by his will, dated the 30th of June, 1794, reciting, that his wife was already provided for by settlement, gave her some additional benefits during her widowhood. Then, after giving legacies to his executors for their trouble, he gave them all the rest, residue, and remainder, of his estates real and personal whatsoever and wheresoever, upon trust to receive the rents, issues, and profits, and to get in all money due to him, and invest it in the funds, upon trust to apply a reasonable part of the said rents, sums of money, and interest, upon the maintenance and education of all and every such child or children as he might happen to have at his death, equally, share and share alike, until such† of them should respectively attain their age of twenty-one years or day or days of marriage; then upon trust to pay such child or children, which should so become of age or married, one fourth part of the whole income of his estates both real and personal; and in case there should be only one such child, which should attain that age or marriage, as aforesaid, then in trust to pay the whole income of all his estate, both real and personal, to such only child, if all his other children should have died without issue; and in case any or either of the said children should happen to die, before she or they respectively attain her or their age of twenty-one years, or day or days of marriage respectively, or without issue, then the parts or shares of her or them so dying under age, unmarried, or without issue, should go to and among, and be in trust for, the surviving child or children, to be equally divided among them, share and share alike, if more than one, and be payable, when and as her or their original parts or shares should by virtue of that his will become payable, and be liable to the same

† *Ellis v. Houstoun* (1878) 10 Ch. D. 236, 240; *Re Horner* (1887) 37 Ch. D. 695; 57 L. J. Ch. 211.

‡ This is probably an error of the press; and should be "each."

contingences of surviving to and among the surviving child or children in case of the death of any of the said children in manner aforesaid, as he had therein before directed concerning her or their original shares or parts; and when his youngest child living should have attained the full age of twenty-five years, then he directed all his real estates to be valued and divided into as many equal shares as he should have children then living; or if any of them should happen to be then dead leaving issue, such share of his deceased child or children to be sold; and the money arising from the sale, together with the proportional *part of all his personal estate as the original share of his deceased child or children to be vested in the public funds; in trust that the interest be divided among his said grand-children, the issue of such his deceased child or children, until the youngest attain his or her age of twenty-one years or day of marriage, which should first happen; and at such time to be transferred to them equally, share and share alike; and in case all or any of his daughters should happen to marry, and not having any child or children of such marriage should happen to die, then it was his will, that the surviving husband should receive the income arising from his deceased daughter's share during his own life, not committing waste; and, when such division was made out, it was his will, that his eldest child then living should have the first choice of her share, and so of the rest according to their seniority; and she or they to have and to hold such share and shares of his real estates, lands, and premises, for and during the term of her and their natural life and lives, and to their issue and the survivor of them for ever.

The will then directed the executors to divide all the testator's personal estate into as many equal shares as he should have children then living, and to transfer or make over to her or them or the issue of her or them, all such share and shares for her and their respective use and benefit, at the said time when his youngest child then living should attain the age of twenty-one or day of marriage: but in case all his said children should die, before they attained their age or ages or day or days of marriage respectively and without issue, then and in such case, he directed, that his executors should stand possessed of

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1800.
July 30.
 —
 LOUGH-
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CARTWRIGHT *v.* VAWDRY.†

(5 Vesey, 530—534.)

An illegitimate child not entitled to share under a devise to children, generally; notwithstanding a strong implication upon the will in favour of that child.

THOMAS CARTWRIGHT by his will, dated the 30th of June, 1794, reciting, that his wife was already provided for by settlement, gave her some additional benefits during her widowhood. Then, after giving legacies to his executors for their trouble, he gave them all the rest, residue, and remainder, of his estates real and personal whatsoever and wheresoever, upon trust to receive the rents, issues, and profits, and to get in all money due to him, and invest it in the funds, upon trust to apply a reasonable part of the said rents, sums of money, and interest, upon the maintenance and education of all and every such child or children as he might happen to have at his death, equally, share and share alike, until such† of them should respectively attain their age of twenty-one years or day or days of marriage; then upon trust to pay such child or children, which should so become of age or married, one fourth part of the whole income of his estates both real and personal; and in case there should be only one such child, which should attain that age or marriage, as aforesaid, then in trust to pay the whole income of all his estate, both real and personal, to such only child, if all his other children should have died without issue; and in case any or either of the said children should happen to die, before she or they respectively attain her or their age of twenty-one years, or day or days of marriage respectively, or without issue, then the parts or shares of her or them so dying under age, unmarried, or without issue, should go to and among, and be in trust for, the surviving child or children, to be equally divided among them, share and share alike, if more than one, and be payable, when and as her or their original parts or shares should by virtue of that his will become payable, and be liable to the same

† *Ellis v. Houstoun* (1878) 10 Ch. D. 236, 240; *Re Horner* (1887) 37 Ch. D. 695; 57 L. J. Ch. 211.

† This is probably an error of the press; and should be "each."

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contingences of surviving to and among the surviving child or children in case of the death of any of the said children in manner aforesaid, as he had therein before directed concerning her or their original shares or parts; and when his youngest child living should have attained the full age of twenty-five years, then he directed all his real estates to be valued and divided into as many equal shares as he should have children then living; or if any of them should happen to be then dead leaving issue, such share of his deceased child or children to be sold; and the money arising from the sale, together with the proportional *part of all his personal estate as the original share of his deceased child or children to be vested in the public funds; in trust that the interest be divided among his said grand-children, the issue of such his deceased child or children, until the youngest attain his or her age of twenty-one years or day of marriage, which should first happen; and at such time to be transferred to them equally, share and share alike; and in case all or any of his daughters should happen to marry, and not having any child or children of such marriage should happen to die, then it was his will, that the surviving husband should receive the income arising from his deceased daughter's share during his own life, not committing waste; and, when such division was made out, it was his will, that his eldest child then living should have the first choice of her share, and so of the rest according to their seniority; and she or they to have and to hold such share and shares of his real estates, lands, and premises, for and during the term of her and their natural life and lives, and to their issue and the survivor of them for ever.

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The will then directed the executors to divide all the testator's personal estate into as many equal shares as he should have children then living, and to transfer or make over to her or them or the issue of her or them, all such share and shares for her and their respective use and benefit, at the said time when his youngest child then living should attain the age of twenty-one or day of marriage: but in case all his said children should die, before they attained their age or ages or day or days of marriage respectively and without issue, then and in such case, he directed, that his executors should stand possessed of

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his estates real and personal, and the dividends, interest, and produce thereof, on trust to pay the growing rents of his real estate and the interest of his personal estate to his wife during her life and her remaining his widow; and after her death or marriage, and in case of all his children dying, as aforesaid, respectively under age, unmarried, and without issue, then he gave and bequeathed all his estates real and personal to his next of kindred and heirs at law, and their heirs and assigns for ever; and he devised the guardianship and education of all his said children during their minorities, as aforesaid, unto his said wife and his executors: the guardianship of his wife to cease upon her marriage: provided always, that as soon as any of his daughters should happen to marry a person to the approbation of *his executors, who would take the name of Cartwright, and live at his house at Oldfield Green, he directed his wife to resign the house to them; and he directed his executors to pay to his daughter's husband, when he had taken the name of Cartwright, 700*l.* over and above the common proportional share of his other children. He farther directed, that all his family plate, watches, and rings, should be valued, and divided into as many equal parts as he should have children; and the first child, that should come of age or be married, to have the choice of their share, and such share given to them immediately.

The testator died on the 4th of July, 1794; leaving his wife surviving, and four daughters by her; Mary, Elizabeth, Ellen, and Judith, and no sons. The eldest daughter Mary was born before the marriage of her parents: the other three were born afterwards.

The bill was filed upon the 3rd of March, 1800, by the eldest daughter Mary; claiming to share with the other daughters under the will upon the intention of the testator. The following circumstances, under which this claim was made, were admitted, and proved by the depositions of the widow, the defendant Vawdry, who was one of the trustees and executors, and other witnesses.

Elizabeth Cartwright was born upon the 29th of May, 1776 Ellen, upon the 22nd of March, 1780, and Judith, upon the 25th of November, 1788: since which time the testator and his wife

had no other child. They had one son born in 1774 ; who died in May, 1786. The testator and his wife were engaged to each other before the birth of Mary. Mrs. Cartwright before her marriage lived in the testator's house at Oldfield Green in the parish of Astbury, Cheshire. In January, 1770, they went to London ; and lodged in Clerkenwell ; and the plaintiff was born at such lodgings upon the 14th of March, 1770. They were married at the parish church of Clerkenwell in February following ; and Mary was baptised in the same church on the 1st of July in the same year ; and registered as their legitimate daughter. Immediately afterwards they returned to Cheshire. The testator never divulged the circumstances of his daughter's birth to her, nor to any one else, except the defendant Vawdry, in confidence ; always endeavouring to keep *the affair secret ; and treating and introducing her as his legitimate daughter. He caused the registry of her birth and baptism to be made in the parish church of Astbury ; stating her birth to have taken place in Clerkenwell upon the 1st of July, 1771. In the same page was the registry of the baptism of the son John, made at the same time.

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The depositions of Vawdry also stated, that the plaintiff and her sisters were totally ignorant of the plaintiff's illegitimacy till after the testator's death ; when she questioned the deponent with regard to her father's affairs ; thinking she had not received what she was entitled to ; upon which the deponent told her the circumstance. A few days previous to the death of the testator, he produced his will to the deponent ; desiring him to read it. The deponent said, he was fearful, it was not worded strong enough to provide for the plaintiff ; upon which the testator desired him to come again in a few days ; and he would get the will altered, so as to have it properly worded to make the property safe to her ; and he mentioned his intention to send for a proper person for that purpose. The deponent went on the day of the testator's death, for the purpose of being present at the alteration of his will : but the testator died a few hours before he arrived. The deponent has no doubt, the testator meant to provide for the plaintiff as amply as for his other children.

The defendant, the widow of the testator, being also examined

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as a witness, stated that the plaintiff was always considered and treated as legitimate; and that the testator at several periods said to her, "My child, I will take care of you."

The defendant Elizabeth Cartwright by her answer expressed her consent, that the plaintiff should share equally with her and her other sisters; and it was stated in the evidence that the other two daughters had the same disposition; but they were infants.

Mr. Richards, and Mr. Evans, for the plaintiff:

[*534] Upon this will it is plain, the plaintiff was in the contemplation of the testator to be considered a lawful child. The distribution in fourth parts points out distinctly, that she was in his contemplation one of his four daughters. That must have some allusion to four children. Every *expression applies to females. That shews, he meant existing daughters, not future issue, that might be either male or female.

As to the parol declarations relating to the will itself, it is doubtful, I admit, whether that evidence is admissible. But this is a case of latent ambiguity.

Mr. Stanley for the defendants, expressed the disposition of the daughters in favour of the plaintiff.

LORD CHANCELLOR :

This is a very unfortunate case. I have no doubt of the intention: but how can I possibly put upon the will the construction the plaintiff desires, when there are lawful children? The family will act very honourably and conscientiously by giving way to the disposition, which is stated: but it is impossible in a court of justice to hold, that an illegitimate child can take equally with lawful children, upon a devise to children. *Mr. Vawdry's* evidence increases the regret. When the testator placed that confidence in him, it was very wrong not to follow his advice. If he had named this daughter, it would have done.

Upon the proposal of the plaintiff's counsel, as the youngest daughter did not want more than three years of the age of twenty-one, the cause was ordered to stand over.

HARTLEY v. HURLE.†

(5 Vesey, 540—546.)

To exempt the personal estate from the payment of the debts the will must afford a necessary implication: viz. that inference, that leaves no doubt upon the mind of the Judge.

Testator gave, devised, and bequeathed, all his messuages, lands, tenements, and hereditaments, whatsoever and wheresoever, and all his monies in the funds, to trustees, their heirs, executors, administrators and assigns, according to the several and respective estates and interests therein; and declared the trusts of the rents, issues, and profits, dividends, interest, and proceeds, subject to ground-rents and other outgoings in respect of his said messuages, lands, &c.: the leasehold estates pass with the freehold upon the subsequent words.

HENRY ALLEN, by his will directed, that all his just debts, funeral and testamentary expenses, be in the first place fully paid and satisfied. He then gave and bequeathed to his dear wife Ann all his household goods and furniture of household, plate, jewels, linen and china, in, upon, and about, his two houses at Islington and Ramsbury, to and for her own absolute use and benefit. Also he gave her all such sum and sums of money, benefit, right, and interest, which shall become due and payable from the Amicable Society for perpetual Assurance of Serjeant's Inn. He gave, devised, and bequeathed, all his messuages, lands, tenements, and hereditaments, whatsoever and wheresoever, and also all his monies in the funds, to his son-in-law William Hartley and his worthy friend Henry Hurle, their heirs, executors, administrators, and assigns, according to the several and respective estates and interests therein; upon trust, that they and the survivor, his heirs, executors, administrators, and assigns, shall and do out of the rents, issues, and profits, of his said messuages, lands, tenements, and hereditaments, and the dividends, interests, and proceeds of his monies in the funds, pay all his just debts, funeral and testamentary expenses, and the several legacies or sums of money hereinafter mentioned: that is to say; to his wife 150*l.* immediately after his decease: to Henry Hurle, for the trouble he may have in the execution of the trusts of the will, 100*l.*

The testator then gave several other legacies; all which legacies he directed to be paid within twelve months next after

† *Tyler v. Lake*, 2 Russ. & My. 183.

1801.
July 30, 31.
Rolls Court.
GRANT, M.R.

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his decease, or sooner, if his trustees should think proper. He also directed, that his trustees should from time to time out of the rents, issues, and profits, of his said messuages, lands, tenements, and hereditaments, and the dividends, interest, and proceeds, of his money in the funds, pay an annuity of 300*l.* a-year to his wife during her life, the first *payment to be within six months after his decease; and upon farther trust, that they shall pay all the rest and residue of the said rents, issues, and profits, dividends, interest, and proceeds, (subject to ground-rents and other outgoings in respect of his said messuages, lands, tenements, and hereditaments) into the proper hands of his daughter Ann Hartley, until his grand-daughter Ann Hartley shall attain the age of twenty-one, or be married; which shall first happen; and when and so soon as she shall attain twenty-one, or be married, then upon trust, that they shall and do out of the rents, issues, and profits, dividends, interest, and proceeds, as aforesaid, pay his said grand-daughter an annuity of 300*l.* a-year during her life; and shall and do pay the residue and overplus of the said rents, issues, and profits, dividends, interest, and proceeds, after satisfying the said annuity, and ground-rents and outgoings, as aforesaid, into the hands of his said daughter during her life, to and for her own use and benefit; and from and immediately after the decease of his daughter he gave, devised, and bequeathed, all his said messuages, lands, tenements, and hereditaments, monies in the funds, and the dividends, interest, and proceeds, then due from the same, and all his estate and interest therein, unto and to the use of his grand-daughter, her heirs, executors, administrators and assigns, subject to the proviso and declaration after-mentioned: provided, that in case his grand-daughter shall not at the decease of his daughter have attained the age of twenty-one or be married, then that his trustees shall continue to receive the rents, issues and profits, dividends, interest and proceeds, for her use and benefit, until she shall have attained that age, or been married.

The testator then expressly declared, that his leasehold estates should not be sold. All the rest and residue of his real and personal estate, whatsoever and wheresoever, and of what nature, kind, and quality, soever the same may be, not by him otherwise

given and disposed of, he gave, devised and bequeathed unto his said daughter, her heirs, executors, administrators, and assigns, absolutely and for ever; and he appointed the said William Hartley, his daughter Ann Hartley, and the said Henry Hurle, his executors.

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After the death of the testator the bill was filed by William Hartley, administrator of his wife, the testator's daughter, also deceased, against Henry Hurle, and the infant grand-daughter of the testator, who was heir at law to him and to her mother. The will having been established, and the cause coming on for farther directions, the principal question was, whether the personal estate was exempt from the debts.

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Another question, not appearing on the pleadings, was suggested at the bar; whether the leasehold estates passed under the disposition creating a fund for the debts.

Mr. Stanley and Mr. Johnson, for the plaintiff:

The personal estate is by this will exempted from the debts, upon all the authorities down to the late cases, and particularly *Burton v. Knowlton*;† in which your Honour went very fully into them all. There was no particular exemption in that case. In this case, though there is first a general direction, that the debts and funeral and testamentary expenses shall be paid, the testator has immediately afterwards provided a particular fund, which is very ample, amounting to 1,200*l.* a-year for the debts, legacies, and annuities. The personal estate he has given as a residue. The words are very near those in *Burton v. Knowlton*. The Courts have been uniformly of opinion, that to exempt the personal estate there must be express words or demonstration plain. In this case the intention is clear. The residuary bequest comprises expressly all the personal estate not by him otherwise given and disposed of. This does not come within *The Duke of Ancaster v. Mayer*.‡ There is, I admit, a shade of difference between this case and *Burton v. Knowlton*, from the first direction in the outset of the will for the payment of his debts: but that is not sufficient. It is clear, he intended to give as a particular bounty all the remainder of his estate, except what

† 3 B. R. 62 (3 Ves. 107).

‡ 1 Br. C. C. 454.

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was before given specifically. In *Tait v. Lord Northwick* † there was an ingredient, that the funeral and testamentary expenses were not provided for; which in this instance are expressly charged upon this fund, not by law liable to them. This is a disposition not only of real estate, but also of personal property, money in the funds; which alone is more considerable than the debts. The testator's daughter is not a trustee for payment of the debts. She is an executrix: but this *is not given to her in that character. That was relied on in *Burton v. Knowlton*.

The next question is, what passed by this clause for the purpose of creating a fund for the debts. The words, "messuages, lands, tenements, and hereditaments" are certainly very comprehensive. It will be contended, that they include leasehold estate; and certainly the subsequent words favour that construction. If upon reading the will the Court should have any doubt upon this point, the case ought to stand over.

Mr. Richards and *Mr. W. Agar*, for the defendants, upon the second point were stopped by the Court.

MASTER OF THE ROLLS:

Upon that point the first words, "messuages, lands, tenements, and hereditaments," alone certainly would not pass a leasehold estate: but I am clearly of opinion, that what follows is sufficient. He gives his messuages, lands, tenements, and hereditaments, and his monies in the funds, to the trustees, their heirs, executors, administrators, and assigns, according to the several and respective estates and interests therein; and the word "ground-rents" puts it out of all doubt.

For the defendants, upon the other question:

These cases must depend upon their own circumstances. The question must be, whether there is demonstration plain of an intention to exonerate the personal estate. There is none of the evidence of that intention in this will, upon which your Honour relied in *Burton v. Knowlton*. No expression shewing an intention to discharge the personal estate, is to be found. The will begins by a direction, that all the debts, funeral and tes-

tamentary expenses, are to be paid. That would charge the real estate as well as the personal: but the personal estate must be first applied. According to the common construction the personal estate is pointed to by that clause, as the fund first applicable. The specific articles then given to the testator's wife are taken out of that fund. The next disposition charges the real estate, as an auxiliary fund, with the debts and legacies. If the testator intended the debts to be charged exclusively upon that part *of his property, such intention would have been shewn. The word "real" in the residuary clause can have no meaning, all the real estate being given before, except to shew, he did not mean the personal estate to be exempt. *Burton v. Knowlton* has these remarkable words "not before specifically disposed of;" which are wanting in this will. Can the Court find words in this will to authorise a sale of the freehold estate; for the leasehold cannot be sold? The real property is limited with a view to keep it in his family. There is no case, in which, the will containing such a general direction as this for the payment of the debts, any gift of the residue afterwards has been held discharged without an express exemption. *Samwell v. Wake*; † *Noke v. Darby*.‡ By a residuary disposition the testator only means, that he will not die intestate as to any part of his property: and with that view he throws in the words "real estate."

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Mr. Stanley, in reply :

There are other parts of the property taken out of the residue: viz. after the legacies to the wife all his money in the funds; which he takes out of the personal estate; and has appropriated to this fund. It is not therefore to be considered the general residue after payment of the debts, but after those specific articles are taken out of it, either for the wife or for this purpose. It has been considered in all the modern cases, that an express exemption is not necessary; the dispute has always been, what constitutes demonstration plain; and there has been a good deal of cavil upon the expression "irresistible inference." Under this trust an ample fund is provided, even without resorting to the real estate: but if it should prove very inconvenient to pay

† 1 Br. C. C. 144.

‡ 3 Br. P. C. 290.

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the debts out of the rents or dividends, the Court would apply the capital.

July 31.

THE MASTER OF THE ROLLS :

The only question, that remains in this cause, is, whether the personal estate given to the daughter of the testator is exempted from the payment of his debts. The effect of the will is, that, after a general direction, that the debts and funeral and testamentary expenses shall be paid, which I consider as a direction to his executors to pay them, the persons who take the personal estate, and which operates as a trust upon them to pay those debts, he gives certain parts of his personal estate to his wife.

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*He then creates a fund ; which he vests in two trustees, who are two of his executors, for the purpose of doing that which he had before directed to be done, to pay his debts and funeral and testamentary expenses, and not only those, but likewise his legacies. The legacies therefore are without all doubt charged only on this fund. The fund thus created consisted of the testator's real estate and a part of his personal estate. After creating this fund he gives the annual produce of it, subject to the debts, legacies and annuities, to his daughter, as I conceive, to her sole and separate use. The direction is to pay into her proper hands.† After her decease the trust is declared for his grand-daughter at twenty-one or marriage ; and then follows the residuary clause.

It was contended, that this is a specific gift of the personal estate undisposed of to his daughter exempt from the payment of his debts. Whatever might have been my opinion upon this case before the case of *Tait v. Lord Northwick*,‡ I must now be extremely cautious, before I proceed to decide upon this point beyond the case of *Burton v. Knowlton* ; for it is extremely clear, the noble Lord, who decided *Tait v. Lord Northwick*, intimated a strong doubt of the propriety of my determination. I have had occasion, and have taken great pains, to consider that case very

† According to later authorities these words are not sufficient to create separate estate (*Tarsey's Trust* (1866) L. R. 1 Eq. 561, 566, 35 L. J. Ch. 452), except perhaps when the grantor is

husband of the grantee (*Surman v. Wharton*, '91, 1 Q. B. 491, 493, 60 L. J. Q. B. 233).—O. A. S.

‡ 4 R. B. 358.

fully, since this was argued last night ; and I think, if I was to decide it again, I should still be of the same opinion. But there are many distinctions between that case and this. First, in that the will does not set out with any direction for the payment of the debts. The testatrix begins with a devise to trustees in trust to pay all the debts and funeral expenses ; and after having so done and having disposed of the surplus of that fund, and of part of her personal estate, she gives to her executor, not in trust for himself, but for such uses as she should appoint, the residue of her personal estate not before specifically disposed of, and, for default of appointment, to him for his own use and benefit.

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The residuary clause in this will is not a specific gift at all, except with reference to what is before given. It is not merely personal estate, but the rest and residue of his real and personal estate not otherwise given ; whereas he had given all his real estate before in trust for the payment of his debts ; and I must admit, his funeral *and testamentary expenses are included. It is impossible to suppose it anything more than a gift of what was not before given, not as a specific bequest, but of what might have been omitted ; not to the separate use of his daughter, but to her generally ; not to be paid into her proper hands. So, it appears to be, that after a general direction for the payment of his debts and funeral and testamentary expenses he gives all his real estates and a considerable part of his personal estate, his money in the funds, to trustees for the payment of his debts, &c. ; and then makes this general residuary disposition. However I may be more liberal than others in construing a will in favour of the legatee of the personal estate, and nine times in ten I really believe upon such gifts the Court by its rules has violated the intention, yet, whatever may be my own idea upon it, I will not set that up against the rules, that have been laid down by great men ; and from all the cases, *The Duke of Ancaster v. Mayer*, and all the others, I find, that, unless there is a necessary implication, the personal estate shall not be exempt. I have before had occasion to comment upon the sort of implication. It cannot be an irresistible inference ; but that inference, that leaves no doubt upon the mind of the person to decide. But I find no case, as has been fairly admitted, in which the testator, after beginning

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with a direction for the payment of the debts and funeral expenses, which naturally fall upon the personal estate, and are to be paid by the executors, has created a fund for his debts and funeral expenses, and then given the residue by such words, (for it is not given to the separate use of his daughter) and it has been held, that he meant that trust fund as anything more than auxiliary, if the personal estate should be deficient; and with that impression I am not at liberty to decide in favour of the residuary legatee as to the exemption of the subject of that residuary disposition; which I consider as only general words thrown in, perhaps without any definite intention. Therefore with some reluctance, but bound down by the authorities, I decide, that there is not sufficient in this residuary disposition to exempt it from the payment of the debts.

WHITE v. WHITE.

(5 Vesey, 554—555.)

For the report of this case see 4 R. R. 161.

PARSONS v. PARSONS.

(5 Vesey, 578—583.)

1796.
July 9.

1800.
Aug. 13.

Rolls Court.
ARDEN, M.R.

[578]

A contingent legacy failed: the event, which happened, not being provided for; and no necessary implication in favour of the legatee.

WILLIAM COLE by his will bequeathed to his executors 1,600*l.* 8 per cent. Consolidated Bank Annuities; in trust to pay the interest, dividends, and profits, thereof, as the same should from time to time become due and payable from the time of his decease, unto Isabella Henwood, then residing with his wife Mary Cole, until three months next after the decease of his said wife; and in case the said Isabella Henwood should be then living, and should have attained the age of twenty-one years, then in trust to pay, transfer and assign, the said 1,600*l.* 8 per cent. Annuities unto the said Isabella Henwood to and for her own proper use and benefit, together with all such arrears of interest, dividends and profits, as should or might be due thereon: but in case the said Isabella Henwood should happen to depart this life before

the end of three months next after the decease of his said wife Mary Cole under the age of twenty-one years and unmarried, then and in such case he directed, that the said legacy of 1,600*l.* 3 per cent. Annuities should sink into and become part of the residue of his personal estate; and in case Isabella Henwood should survive his said wife, and at the time that she should become entitled to a transfer of the said Bank Annuities she should be married, then he directed, that his executors should pay, &c. the said 1,600*l.* unto such person and persons, and for such ends, intents and purposes, as she should notwithstanding her coverture by any deed or deeds, instrument or instruments in writing, executed in the presence of two or more witnesses appoint: so as the same might be received and enjoyed *by her and her children, if any, free from the debts, control, or engagement, of any husband she might happen to marry; for which purpose he directed, that the receipt and receipts, appointment and appointments, of the said Isabella Henwood alone should from time to time notwithstanding such coverture be sufficient discharges to his said executors and trustees to all intents and purposes whatsoever, without her husband joining therein; and in case the said Isabella Henwood should happen to depart this life, before she should have attained the age of twenty-one years, leaving lawful issue, then he directed, that his executors, &c. should transfer, assign, set over, and divide, the said sum of 1,600*l.* Bank Annuities or the produce thereof unto and among all and every the child and children of the said Isabella Henwood lawfully begotten, who should be living at the time of her decease, share and share alike, if more than one; and if but one, unto such only child. But in case any of the said children should happen to depart this life before the age of twenty-one years, then he directed, that the share or shares of him, her, or them, so dying should belong to and be equally divided between and among the survivors or survivor of him, her, or them, so dying. He gave all the rest, residue, and remainder, of his personal estate and effects to his three executors and Isabella Henwood, their heirs, executors, administrators and assigns, for ever.

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Isabella Henwood after the testator's death married Robert

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Parsons. She attained the age of twenty-one in 1789 ; and she and her husband in her right received the dividends of the stock till her death in 1795. The testator's widow survived her.

The bill was filed on behalf of George Parsons, the only child of Robert and Isabella Parsons, an infant ; praying, that the plaintiff may be declared entitled to the legacy of 1,600*l.* 3 per cent. Consolidated Bank Annuities, with the dividends from the death of his mother.

The defendants, the surviving executors, and the personal representatives of one, who was dead, claimed the stock, as having in the event, that happened, fallen into the residue.

Mr. Graham and Mr. King, for the plaintiff :

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Though the precise event described, viz. the death of Isabella Henwood under the *age of twenty-one, leaving issue, has not happened, yet there have been many cases, in which the particular expressions of the will have given way to the manifest general intention ; which upon this will was to provide for Isabella Henwood and her children. The stock was to sink into the residue in one event only : the death of Isabella Henwood before the end of three months after the death of his wife under the age of twenty-one and unmarried. From that an implication arises, that, if she should marry and have issue, it should not sink : *Jones v. Westcombe* ; † *Statham v. Bell*. ‡ The contingency, upon which the interest of Isabella Parsons depended, viz. her surviving the testator's wife three months, did not extend to her children. The cases of *Doo v. Brabant* § and *Calthorpe v. Gough* ¶ will probably be cited for the defendants. In these cases the testator contemplated an event, in which the person, who was to take in the first instance, might have the absolute property and the disposition of it. He did not look to the event, that did happen. *Doe v. Applin* ¶ is a very strong authority for rejecting particular limitations in favour of the general intention.

Mr. Lloyd, for the defendant :

There is no clear intention upon this will, that the children

† Pre. Ch. 316 ; 1 Eq. Ca. Abr. 245.

‡ 2 Cowp. 40.

§ 3 Br. O. C. 393.

¶ 3 Br. O. C. 395, in a note.

¶ 2 R. R. 337 (4 Term R. 82).

should take any interest, except in the event mentioned. It is much safer to abide by the words of the will. The bequest to Isabella Parsons and her children depends on one and the same event; an event, which never happened; and the words are so strong, that they must control the construction; and the Court cannot reject them; as in the case of any other uncertain event, which is to have the effect of a condition precedent; as marriage: *Atkins v. Hiccocks*.† This is directly within what the Court laid down in *May v. Wood* ‡ as to the necessity of the condition taking place, where it is intended. *Doe v. Applin* does not apply to this case; for that was upon a question, whether the ancestor took an estate for life or in tail; and the construction was in favour of the latter to effectuate the general intention. In *Denn v. Bagshaw* § the Court did not think themselves at liberty to depart from the words.

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But there is a preliminary question in this cause; which stands in the way of the rights of all parties. The capital of *this stock is not to be paid to anyone until the expiration of three months after the death of the testator's widow. She is still living. How therefore can the capital be claimed?

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THE MASTER OF THE ROLLS :

This case has been a great while before me. It was first sent to the Court of King's Bench; and that Court in consequence of the fund being stated to be in the hands of trustees refused to answer it; and since that time it has stood for judgment. It is one of those cases, in which, as Lord KENYON observed upon *Denn v. Bagshaw*, I find my wishes in opposition to what I am bound judicially to decide. I have been very desirous, that I could upon judicial grounds raise an implication of what certainly is not expressed; that either the child of Isabella Parsons, or she herself, took a vested interest in this fund: but upon great consideration I am under the necessity of determining, that no interest vested either in her or her child. This is almost exactly the case of *Doo v. Brabant*. It is true, when that case was first before Lord THURLOW, his Lordship seemed to entertain considerable doubts upon my decision in *Calthorpe v. Gough*: but I rather

1800.
August 13.
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† 1 Atk. 500. ‡ 3 Br. C. C. 471. § 3 R. R. 242; 6 Term R. 512.

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think, that case was not sufficiently stated to him ; for it was not near so strong as *Doo v. Brabant* ; which Lord THURLOW sent, after intimating a strong opinion upon it, to the Court of King's Bench : but that Court dissenting from that opinion, his Lordship decided according to *Calthorpe v. Gough*. That case admitted of none of the inferences, that might have been made in the other. It was clear, nothing was intended to vest in the children but what Lady Gough had a complete power to dispose of ; and I have been since informed, that knowing the will of her brother, who became a lunatic, she actually exercised that power ; and though it lapsed, that is an event nine times in ten not foreseen by the testator ; who probably, had he foreseen it, would have provided accordingly.

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Upon the words of this will it is very difficult to know, how the circumstance of the legatee's surviving the testator's wife was material to vest the fund in the legatee. But it is expressly so ; and then it is not given at all events after the death of his wife ; but if the legatee shall be then living, and shall have attained the age of twenty-one. So there could be no vested interest in her till after the death of the testator's wife ; but if she should be then living, and should have attained the age of twenty-one, she was to acquire the absolute interest. It is very unfortunate, that the testator has left unprovided for the event, that has happened. She did not survive the wife : but she attained the age of twenty-one, married, and has left a child ; and the question is, whether there was any vested interest whatever either in her or her child. In principle it is almost the case of *Doo v. Brabant*.

The case of *Denn v. Bagshaw* undoubtedly revolts the feelings of any man sitting in judgment ; provided he is at liberty to indulge them in anything beyond necessary implication. Nothing could be more repugnant to what must be supposed the will. In that will, as in this, the surviving the testator's daughter was made a condition, upon which the grandson should take ; though it cannot be conceived, that merely because he did not survive his mother, though he should have issue, they should be defeated. It was strongly contended, that the words " if living at the time of her death " could not prevent the heir male from

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taking ; but that it was to be considered as if those words were not in the will ; and that an estate tail was intended. All the Judges were of opinion, there was every reason to infer, that that circumstance was not intended as a condition ; but, that it was not a necessary and unavoidable implication. That is the situation, in which I now find myself. * * The MASTER OF THE ROLLS then referred to other cases in which he had declined to introduce words in wills unless by necessary implication, and then continued as follows :

[583]

For some reason the testator made the surviving his wife three months a condition of Isabella Henwood's taking an absolute vested interest. Why he did so, no one can tell. He directs, that this stock shall sink into the residue in the event of her death before that time, under the age of twenty-one, and unmarried. I wished to consider it vested at the age of twenty-one, whether she survived the wife or not : but so far from that, he again takes up the consideration of her surviving his wife ; giving her a power to dispose of it independent of her husband ; and then stating the case of her dying under the age of twenty-one, leaving issue. If the case had been put to the testator, he would have said, if she should die, leaving children, without having acquired the absolute interest, it should go to her children : but he gives it to her issue only in the event of her dying under the age of twenty-one ; which brings it to the cases I have mentioned ; a contingency, that has not taken place ; upon which only the legacy is directed to vest. If I could have determined in favour of any of the parties before me, it must have been for the representative of Isabella Parsons : but I am under the necessity of declaring, that neither the plaintiff George Parsons nor the defendant Robert Parsons, as administrator of his wife, took any interest in the legacy of 1,600*l.* Bank Annuities ; the contingency, upon which the same was given, not having taken place.

BYNE *v.* VIVIAN.

(5 Vesey, 604—608.)

1800.
*Jan. 28.*LOUGH-
BOROUGH,
L.C.
[604]

A court of equity has jurisdiction to order the delivery up of securities, and to give other relief in respect of a transaction which is null and void at law, although no special equitable ground for such interference is shewn.

HENRY BYNE, being seised of premises at Mitcham in the county of Surrey for his life, granted to Josiah Vivian an annuity of 15*l.* a year during the life of the grantor : and by indentures, dated the 9th of July, 1784, Byne demised the premises at Mitcham to Vivian, his executors, administrators and assigns, for 99 years, if Byne should so long live, without impeachment of waste, to secure the annuity out of the rents and profits or by sale or mortgage ; with a proviso for redemption upon six months notice on payment of 105*l.* for the whole annuity, and in the like proportion for any part, that Byne might desire and give notice to redeem, and all arrears. Byne also executed a bond of the same date in the penalty of 210*l.* for the payment of the annuity. He gave a receipt at the same time for 105*l.* therein mentioned to have been the consideration.

In 1798 the premises were conveyed by Byne and the other persons interested in them to Powell, to hold to him, his heirs and assigns for ever upon certain uses and trusts.

The bill was filed for the purpose of setting aside the annuity, upon two objections to the memorial of the indenture and bond, registered under the Annuity Act : † first, that the clause of redemption was not contained in the memorial : 2ndly, that the consideration was not truly stated ; being expressed to be paid in money ; whereas it was paid by drafts on a banker. A third objection was taken at the bar, that the term was not noticed in the memorial.

The bill charged, that the defendant advanced only 98*l.* 5*s.* 2*d.* as the consideration. The answer stated, that the defendant did upon the 9th of July, 1784, advance 105*l.* to the plaintiff by giving him a draft received by the defendant from James Potter

† 17 Geo. III. c. 26, repealed by statute 53 Geo. III. c. 141.

upon *his bankers. The annuity was paid down to 1795; from which time it was in arrear.

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The bill suggested, that the defendant had been in possession of the premises.

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The *Attorney-General*, for the plaintiffs :

The memorial does not state the term of ninety-nine years at all, nor the clause of redemption : nor is the payment of the consideration truly stated. All these objections are fatal. * *

Mr. Mansfield, for the defendant :

* * This is not a bill to set aside a bond or any instrument on account of a corrupt consideration, which the policy of the law condemns, or of any fraud by the person obtaining the bond but upon formal objections under the Act, making all the instruments void; of which the person, who has got the annuity, never can make the least use; and the grantor cannot be injured, if the instruments are suffered to subsist. The moment any attempt is made to enforce the annuity, the Court will declare the instrument *void; and if it should go to trial, the moment the instrument is produced there is an end of it. The demise is void. The deed itself expressly shews, the demise was made merely to secure the annuity. Upon an ejectment brought upon this deed the Court might immediately under the terms of the Act interpose on motion. It is impossible to stir a step upon that deed without proving a proper memorial. The plaintiff then comes into Equity to do that, which might be done on motion, if any proceeding was taken to enforce this annuity.

[*606]

This bill is wholly different from a bill to set aside a bond or any other instrument given upon a corrupt consideration. Such bills were formerly entertained upon this ground; that the corrupt consideration could not be pleaded at law; that being considered an averment contrary to the instrument: but that has been held by the Court of Common Pleas† and afterwards by the Court of King's Bench to have been founded on a mistake of the rule, that an averment cannot be made against a deed; for that only shews the real consideration; and there is no

† *Collins v. Blantern*, 2 Wils. 341.

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reason why the party should not avail himself of the objection at law, if by the policy of the law the instrument is void. Those cases however are very different from this ; proceeding upon a clear ground ; that though since those determinations the party might avail himself of the objection at law, yet the evidence might be lost : the witnesses might die ; and it would be uncertain, whether he could at a future period prove the corrupt consideration. But in this case the proof lies upon the person, who wishes to avail himself of the instrument. He must produce a memorial ; and if he does not, the other party may get a copy of it from the office. This sort of case therefore affords nothing of the principle of *Quia timet*. * * In this instance the ground for the interposition of this Court does not exist. The instrument is not only void at law, but the party to be affected by it has the proof always in his power. There is no pretence for an account ; and the whole foundation of the bill is, that the grant of the annuity is void.

[607] The *Attorney-General*, in reply :

Upon all the grounds, upon which this Court proceeds in giving this species of relief, a decree must be obtained in this case. The Court of King's Bench did at one time order such instruments to be delivered up to be cancelled : but now they disclaim that jurisdiction. This is an incumbrance upon the estate ; which cannot be disposed of, till this term is disposed of. A court of equity has taken jurisdiction in cases, where the security has been void at law : as upon usurious contracts. The party has a right to come to have the instrument delivered up. The reason is, that he has a right to have the property cleared ; and that the other shall not retain the security, merely to keep a cloud over the title. * *

LORD CHANCELLOR :

* * With respect to this question, there are, I apprehend, several decrees. There can be no doubt, that, though a court of law would set aside the judgment, yet if they come to a determination not to meddle with the other securities I must take away the incumbrances ; and this Court does it upon equitable terms

considering him as an incumbrancer. It is clear, they would be nonsuited in an ejectment: but still it is an incumbrance. An estate is created; and a charge of 15*l.* a year during the life of the plaintiff. He must pay the principal, interest, and costs.

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The *Attorney-General* said, the sums actually received by the defendant must be taken into the account. [608]

Mr. Mansfield, for the defendant:

Insisted on the contrary; observing, that the annuity was paid down to 1795; and the defendant ran the risk the whole of that time.

LORD CHANCELLOR:

The terms of the redemption must be an account of what is due. I consider it as a loan. There is not a single case, where an annuity has been set aside, and an action at law has been brought for the money, in which the account has not been taken. I remember several actions; and the account has always been taken.

The decree directed the Master to take an account of what was due to the defendant for principal and interest, in respect of the sum of 105*l.* paid for the purchase of the annuity, and to tax his costs of this suit; an account of all sums received by the defendant on account of the said annuity; and it was ordered, that what should be found due from the defendant be deducted from what shall be found due to him for principal, interest, and costs; and upon the plaintiff's paying to the defendant what, if any thing, shall remain due to the defendant for principal, interest, and costs, within three months after the report, or in case it shall be found, that the defendant hath been fully satisfied, it was ordered, that the defendant deliver to the plaintiffs the said indenture and bond to be cancelled; and also convey the premises free and clear of all incumbrances by him or any person claiming under him, out of which the annuity was payable, or as he shall appoint; and deliver all deeds, &c.; and in case it shall appear, that the defendant has been overpaid, it

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was ordered, that he pay such overplus to the plaintiff; and if the plaintiff do not so pay what, if any thing, shall appear to be due to the defendant, it was ordered, that the bill should be dismissed with costs.

Note.—In the similar case (*Byne v. Potter*) which follows *Byne v. Vivian*, and is shortly reported at 5 Ves. 609, the void annuity was granted and similarly secured by a bond and term of years by indentures dated the 2nd of July, 1784, and by a deed of covenant dated the 9th of July, 1784. The defendant, the grantee of the void annuity, admitted that he had received payments thereunder in excess of his purchase-money and interest. The decree directed delivery up of the indentures and deed of covenant to be cancelled, and of all papers belonging to the plaintiff, but no direction was given for repayment of the surplus money received by the defendant. Both these cases are very fully considered by Lord ELDON in *Bromley v. Holland* (7 Ves. 3) see 6 R. R. 58.—O. A. S.

WARING v. WARD.†

(5 Vesey, 670—676.)

1800.

Dec. 1.

Rolls Court.
ARDEN, M.R.
[670]

A bequest of personal estate exempt from debts by mortgage: the benefit of the exemption was confined to that legatee; and failed; the bequest having lapsed by the death of the legatee in the lifetime of the testator.

By indentures of lease and release, dated the 27th and 28th of February, 1771, reciting a mortgage in fee in 1753 of the manor of Ince with the appurtenances, by Sir George Wynne to Ruth and Margaret Trevor for 12,000*l.*, in trust for Ruth Trevor, her executors, &c., and also stating a decree, made in 1764, directing those and other estates of Sir George Wynne, to be sold, and that the said manor and hereditaments comprised in the mortgage were sold to Richard Hill Waring for 80,500*l.*; and other premises for 2,000*l.* more; and farther reciting, that by a subsequent order, made in 1769, taking notice, that Mr. Waring had paid 12,500*l.*; and Sir Robert Cunliffe was willing to

* *Kilford v. Blaney* (1885) 31 Ch. D. 66, 55 L. J. Ch. 185.

advance the remaining 20,000*l.* upon mortgage of the premises, it was ordered, that upon payment by Sir Robert Cunliffe into the Bank of that sum in discharge of the purchase-money, Waring should be let into possession; which was done accordingly; and stating, that 17,852*l.* 12*s.* 9*d.*, reported due to Arabella Trevor upon her mortgage, was paid to her upon her executing an assignment; it was witnessed, that in consideration of 20,000*l.* so paid by Sir Robert Cunliffe and the 12,500*l.* paid by Waring, the several parties did by the appointment of Waring and his wife convey the premises to Sir Robert Cunliffe, his heirs and assigns, subject to redemption by Waring, his heirs, executors or administrators, on payment of the said 20,000*l.* with interest on the 15th of October, 1771. The deed contained the usual covenant on the part of Mr. Waring for payment by him, his heirs, executors, or administrators, of the mortgage-money and interest; and he also executed a bond of the same date.

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By indentures of lease and release, dated the 14th and 15th of February, 1786, on assignment of that mortgage the premises were conveyed to Sir John Hadley D'Oyley and John Scott Waring, their heirs and assigns for ever, subject to a proviso or covenant on the part of Richard Hill Waring for redemption on payment of the 20,000*l.* and interest; and he also executed a bond on that occasion.

By indentures of lease and release, dated the 15th of August, 1791, upon a farther advance of 10,000*l.* by Sir *John Hadley D'Oyley and John Scott Waring to Richard Hill Waring he granted, released, and confirmed, to them, their heirs and assigns, the said premises, freed and discharged from the proviso for redemption in the indentures of 1786, but subject to a proviso and covenant on the part of Richard Hill Waring for payment by him, his heirs, executors or administrators, of the said sum of 30,000*l.* with interest. He also executed a bond of the same date in the penalty of 60,000*l.* for payment of the said 30,000*l.* agreeably to the covenant.

[*671]

Richard Hill Waring by his will, dated the 16th of January, 1779, after giving two annuities, and reciting, that since his marriage he had purchased to him and his heirs the manor of Ince, but to enable him to do so had mortgaged the same and other lands

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and premises, devised all his estate and interest therein, subject to the said annuities, and such other annuities, bequests, and directions, as by his said will or any codicil he might give, expressly charging his said estate of Ince therewith, to his wife for life without impeachment of waste; and after her death to such uses and purposes as she being sole and unmarried should by will, or otherwise, as therein mentioned, appoint, subject as aforesaid: so as such appointment should not take effect, till such parts of his lands in Shrewsbury as were in mortgage to Mary Owen should be discharged therefrom; and in default of such appointment then to his own right heirs, subject as aforesaid; and farther reciting, that before his marriage with his then wife she had conveyed all or a considerable part of her messuages, lands, &c. in the county of Flint to trustees upon trust, that they should, so soon as the testator should require, by mortgage thereof raise 3,000*l.*, to be applied in the first place to pay off the principal and interest of a mortgage of 1,850*l.* upon his estate at Oswestry, such mortgage to be thereupon assigned in trust to attend the inheritance of the premises therein comprised for the benefit of the person, to whom the same was by the same indentures limited, the residue of which 3,000*l.* was to be paid to the testator, his executors, administrators and assigns, he thereby directed, unless as hereinafter provided, that the trustees should as soon as convenient, raise such 3,000*l.* and therewith discharge the mortgage, and pay to his wife the residue of the said 3,000*l.*; which he gave to her, together with all the rest of his personal estate; upon trust to discharge all his debts, for which at the time of his decease he should not have given real securities, and all such bequests and annuities (not including those before mentioned) as he should therein or * by codicil give, and with which he should not expressly charge his estate in Ince; and to keep the residue of the said 3,000*l.* and of all other his personal estate to her own use: provided, that if she should by any other means discharge the said mortgage and his said debts, and should pay all such bequests and annuities, (not including those before granted), the said 3,000*l.* need not be raised, as aforesaid.

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By indentures of lease and release, dated the 13th and 14th of

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March, 1797, declaring, that the sum of 30,000*l.* was the money, not of Sir John D'Oyley and John Scott Waring, but of Mrs. Hastings, they by her direction assigned 20,000*l.* to Charles Imhoff, son of Mrs. Hastings, and two thirds of the premises comprised in the indentures of 1791 subject to redemption; and by lease and release, dated the 11th and 12th of May, 1797, the remaining interest in the mortgage, as to 10,000*l.*, was assigned to Sir John D'Oyley and other persons.

The testator's wife Margaret, the daughter and heir at law of Sir George Wynne, died in the testator's life; and he married again. He died upon the 20th of October, 1798; leaving John Scott Waring, his heir at law. The testator's widow took out administration with the will annexed; and she married — Ward. The bill was filed by the heir at law; charging, that the mortgage was not the old burthen upon the estate, when the testator purchased; but that he mortgaged the same in manner aforesaid; and he personally borrowed 30,000*l.*; and pledged the estate as a collateral security for repayment; and did not purchase the said estate or any part thereof subject to such debt; and praying, that the real estate might be exonerated.

The defendant Ward and his wife by their answer claimed the personal estate.

Mr. Lloyd, Mr. Richards, and Mr. Short, for the plaintiff:

* * The will affords no inference of an exemption of the personal estate in favour of the next of kin. The recitals of the conveyance and the order are to the same effect. That mortgage to Sir Robert Cunliffe is clearly an encumbrance imposed by the testator himself; and if so, the personal estate is first liable; unless there is something in the will making an alteration. Perhaps he might have intended his personal estate to go to his wife discharged from the incumbrances: but by her death in his life that bequest lapsed. The personal estate therefore is not disposed of by the will; and must be applicable to this debt imposed by the testator himself. * *

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Mr. Sutton and Mr. Steele, for the defendants:

First, the effect of the will is expressly to charge the real

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estate, and exempt the personal estate: but if the Court is against the defendants upon that, secondly, the sum of 17,852*l.* 12*s.* 9*d.* was the whole incumbrance on the estate at the time of the testator's purchase; and therefore the personal estate is not applicable to that. * * *

[They cited *Tweddell v. Tweddell*, 2 Br. C. C. 101, 152.]

[675]

Mr. Lloyd, in reply, was stopped by the Court.

THE MASTER OF THE ROLLS :

The only question before me now is upon the will; whether the personal estate is discharged from the testator's debts secured by mortgage. I have a pretty strong opinion upon the other point,† that has been argued: but it would be improper to decide that, till it is ascertained, whether the personal estate is sufficient for those charges, to which under the circumstances it is clearly liable.

With respect to the question now to be determined, I have no difficulty in declaring, that it is impossible upon this will to raise any presumption, that the testator meant to exempt the personal estate in favour of this defendant from those debts, which, if there is no exemption, will be a charge upon it. I could refer to many cases, and one before Lord THURLOW, that is quite analogous, in which this has been determined: but upon principle, without referring to the authorities, nothing is more clear, than that if there is any gift in favour of a particular legatee, and he dies, no benefit that legatee could have claimed, if he had survived, can be set up against the persons, to whom the estate would come subject to the disposition in favour of that legatee, if he had lived. If for instance an estate *had been given to A. and the personal estate to B. exempt from debts, that exemption is to be considered as intended only for the benefit of B., that he shall not pay those debts, to which he would be liable, if no such provision had been made; and is not a general exemption of the personal estate. * * *

† It was subsequently decided by Lord ELDON, that the testator had adopted the mortgage debt as his own, and that his personal estate

was liable to exonerate the mortgaged estate independently of the will (7 Ves. 332).—O. A. S.

CAMPBELL v. WALKER.†

(3 Vesey, 678—683; 13 Vesey, 601—604.)

There is no rule that a trustee to sell cannot be the purchaser; but, however fair the transaction, it must be subject to an option in the *cestui que trust*, if he comes in a reasonable time, to have a re-sale; unless the trustee, to prevent that, purchases under an application to the Court. Costs apportioned.

EDWARD HALL by his will gave all his freehold, copyhold and leasehold, estates, and all his personal estate, with some exceptions, to have and to hold unto John Walker and William Clarke, their heirs, executors, and administrators, upon trust, as soon as conveniently may be after his decease to sell for the best prices, that can reasonably be had; to the intent that all his estate and effects may be turned into money, as soon as conveniently may be after his decease; and for the facilitating and corroborating any sale or sales, that may be made, the testator declared, the receipt of his said trustees should be a discharge to the purchasers. He then gave particular directions for selling his estates in lots, in case his said trustees and executors shall not see cause to the contrary: the Link Farm to be one lot; the Quarry Brewhouse another. Then after several legacies the testator gave all the residue among the plaintiffs at their ages of twenty-one.

The trustees in execution of the will proceeded to sell the premises; putting up the Link Farm, and afterwards the Quarry Brewhouse in separate lots and at different times. The Link Farm was purchased by John Clarke in trust for William Clarke, the trustee, for 1,450*l.*, being 10*l.* more than he was directed to bid: but William Clarke agreed to take it. At a subsequent auction John Clarke purchased the Quarry Brewhouse in trust for John Walker and William Clarke for 6,310*l.*

The bill was filed on behalf of the residuary legatees, still under age; praying, that the sales might be set aside, and the premises resold. Upon the evidence the sales were perfectly fair and open. It was declared immediately afterwards, who were the purchasers. The premises were duly advertised; and several

1800.

Dec. 3.

Rolls Court.

ARDEN, M.R.

1807.

June 5, 7.

ELDON, L. C.

[678]

† *Boswell v. Coaks* (1883) 23 Ch. D. (1886) 11 App. Ca. 232, 55 L. J. Ch. 302, 310, 52 L. J. Ch. 465 (affirmed 761, 55 L. T. 32.
in H. of L. nom. *Coaks v. Boswell*

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v.
WALKER. bidders were present at the sales. It was also in evidence, that the trustees endeavoured to persuade the tenant of the Quarry Brewhouse to purchase it. At a previous sale the trustees had bought that lot for 6,040*l.*: but they had it put up again; determining to pay that sum, if it should not produce more.

[679] *Mr. Lloyd and Mr. Steele*, for the plaintiffs cited *Whelpdale v. Cookson*,† *Fox v. Mackreth*,‡ *Crowe v. Ballard*,§ and *Whichcote v. Lawrence* (3 Ves. 740).||

Mr. Richards and Mr. Hubbersty, for the defendants :

It is not now disputed, that the trustee may be the purchaser. The trustee may possibly give a great deal more than the value, *pretium affectionis*. The Court would not order a release, if it should plainly appear to be for the benefit of the *cestui que trust*, that it should not be resold. The rule therefore is not universal: but the Court will require the trustee to shew, that it is not for the benefit of the *cestui que trust*, that there should be a resale. *Whichcote v. Lawrence* || is a very particular case. The plaintiffs there produced positive evidence of fraud; and there is no case of this sort, in which the allegations of the bill have not been sustained by evidence. In this case no evidence is produced by the plaintiffs; and the *bona fides*, with which the defendants have acted, is clearly made out by them. Every thing has been done, that could be done, for the advantage of the estate; and the trustees have given more than any other person would give. The trustees employed a person to bid for them, merely to avoid the inconvenience of deterring other persons from bidding against them. The will gives special directions to sell; and the testator himself marks out the lots. It was very material to sell in that way. If this purchase is not established under these circumstances, trustees will feel it extremely dangerous to act in any degree.

† 1 Ves. sen. 9, stated from the Register's Book, *post* 140.

‡ 2 R. R. 55 (2 Cox, 320).

§ 1 R. R. 122 (1 Ves. J. 215).

|| That case turned upon special circumstances which in the opinion of the LORD CHANCELLOR (Lord

LOUGHBOROUGH) determined the case independently of the general rule, which is more clearly stated and illustrated in the present case of *Campbell v. Walker* than in any previous case.—O. A. S.

MASTER OF THE ROLLS :

CAMPBELL
C.
WALKER.

I take the result of the evidence in this cause to be, that this was a fair *bonâ fide* sale, liable to be impeached only from the circumstance, that the purchasers were the *trustees; and then it is a very important question. It is said for the defendants, there is no case of this kind without evidence to impeach the sale in itself. Whether that is so, or not, the question is, whether there is any principle for such a bill as this, filed on behalf of infants, calling upon the trustees under a will to permit a resale of premises, of which they became purchasers; alleging, that the premises were not sold at the utmost value; and that more might have been got. That they allege; but have not proved; for they have produced no evidence. The defendants admit, they were trustees and purchasers, but at a fair, open, sale; and they say, they gave as much as the premises appeared to be worth, and as much as any one else would give; and no fraud, mismanagement, or negligence, appears before the Court. Still the plaintiffs insist, that according to the principle, which has prevailed in these cases, the *cestui que trust* has a right to put an end to this sale; and I am of opinion, the rule of the Court does go to that extent. It is not necessary for the plaintiffs to oppose the case of *Whitchote v. Lawrence*. According to the principle adopted by the LORD CHANCELLOR in that case no trustee shall ever be permitted to gain an advantage by selling to himself: if he had resold, and got anything by the resale, he should not have the benefit of that. What is the benefit of retaining the premises? If it is for the benefit of the infants, that they should be resold, the difference is equally gained by the trustee. The LORD CHANCELLOR's doctrine in that case certainly applies to a sale of premises, of which the trustee is still in possession. The question will always be, whether the *cestuis que trust* have lain by; or whether there has been any ratification. I will lay down the rule as broad as this; and I wish trustees to understand it; that any trustee purchasing the trust property is liable to have the purchase set aside, if in any reasonable time the *cestui que trust* chooses to say, he is not satisfied with it. The trustee purchases, subject to that equity; that if the *cestuis que trust* come in a reasonable time, they may call to have the estate

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resold. I will lay down the rule as broad as that. The consequence will be, that trustees never will purchase but under certain circumstances ; which I will mention.

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These trustees were bound to sell, if they could get a reasonable price. They did everything proper to pave the way for a sale. They had a valuation made ; and they determined, as was their *duty, not to let the premises go for less than that valuation. Then they find, no one goes up to that price ; and they purchased ; and they are very right, provided they bought subject to the equity I mentioned. They must buy with that clog. The only thing a trustee can do to protect his purchase is, if he sees, that it is absolutely necessary the estate should be sold, and he is ready to give more than any one else, that a bill should be filed, and he should apply to this Court by motion to let him be the purchaser. That is the only way he can protect himself ; and there are cases, in which the Court would permit it ; as if only 500*l.* was offered ; and the trustee will give 1,000*l.* The consequence would be, the Court would do that, which this rule is calculated to procure. The Court would divest him of the character of trustee ; and prevent all the consequences of his acting both for himself and for the *cestui que trust* ; for the reason of the rule is, that no man shall sell to himself : a case, in which it is impossible for the Court to know, that he did not do all he ought to have done. These infants had not the guard they ought to have had ; that the trustee should not act for his own benefit ; and the two characters should not be united. In no other way, that I can figure to myself, except that I have mentioned, can the trustee become the purchaser without being liable to be called upon to give up the purchase. I perfectly agree with the LORD CHANCELLOR. It was a perversion of the rule to say, no trustee should buy. There never was such a rule.

I remember a case, though I do not know what became of it, *Price v. Byrn* ; in which the *cestui que trust* wanted to impeach a sale before the Master of ground-rents, sold twenty years before, and bought by the trustee without the sanction of the Court. Upon that case I said, if it had been impeached in a reasonable time, perhaps even in the case of ground-rents I should have set

it aside ; and consider the case of ground-rents. They speak for themselves. The question is, how many years purchase they are worth. Therefore it is impossible for the trustee to have any management as to the value. But in that case after such a length of time I would not set it aside.

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But see, how dangerous this is. It is impossible to know, whether any advantage has been gained. According to the LORD CHANCELLOR the only question, when a bill was filed, is whether any advantage has been gained by the trustee ; † and if *so, he shall not retain. In this case, therefore, without impeaching the character of these trustees, and admitting, that they acted *bonâ fide*, I must hold, that they purchased subject to the equity called for by this bill. I know, it very often turns to the disadvantage of the infants : but I cannot help that. It is better to adhere to the general rule. If *cestuis que trust* should come after a great length of time, finding it a gaining bargain, I would dismiss the bill. But in this case they are infants still. I wish it to be understood, upon what terms trustees may purchase, so as to be protected from this equity ; and I repeat, there is no other way than that I have mentioned ; a bill filed ; and the trustee saying, so much is bid ; and he will give more. The Court would examine into the circumstances ; ask who had the conduct of the transaction ; whether there is any reason to suppose, the premises could be sold better ; and upon the result of that inquiry would let another person prepare the particular, and let the trustee bid. This decision has no reflection whatsoever upon the conduct of these trustees ; and I do not wish to have it understood, that the resale is a reflection upon them ; or that they have not acted *bonâ fide*. But the only ground of my determination is, that they are still trustees for the plaintiffs ; and if the plaintiffs choose to have the premises resold, they must be resold ; for the trustees must not gain any advantage by the transaction.

[*682]

Let it be referred to the Master to inquire, whether it is for the benefit of the plaintiffs, that these premises shall be resold ;

† Lord ELDON, L. C., subsequently disavowed this interpretation of Lord LOUGHBOROUGH's (after-

wards Lord ROSSLYN's) decision, see *post*, 6 R. R. 10 (6 Ves. 627).

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and if the Master shall be of opinion, that it will be for their benefit, declare, that they shall be resold. Let the trustees have all just allowances ; and reserve the consideration of costs.

Mr. Alexander (amicus curiæ) produced the following statement of *Whelpdale v. Cookson*, taken from the register's book.†

[*683] There was no charge in the bill to this point. The bill was filed by a creditor against the defendants, as against executors and trustees. The defendants in their answer state the purchase by public auction ; and the Court as to this part of the case order the creditors to elect, whether they will abide by the purchase. If the majority of them elect not to abide by the purchase, then it was to be put up again, *and sold before the Master : the trustee to account for the profits ; and to be allowed his principal money, with interest at 4 per cent. ; if the majority elect to abide by the purchase, the trustee was to account for the purchase-money with interest.

The MASTER OF THE ROLLS upon looking at this statement said, it was exactly his opinion.

Note.—The cause came on upon the Master's report, and was heard by Lord Eldon, L.C., on the 5th and 7th June, 1807. The Master's report stated that the estates had been purchased at an undervalue, and the purchase was accordingly set aside with costs. The following report of the judgment of the Lord Chancellor is taken from 13 Ves. pp. 601 & 604.—O. A. S.

1807.

June 5, 7.

ELDON, L. C.

[13 Ves.
 601]

LORD CHANCELLOR :

In this case of *Campbell v. Walker*, I understand, that Lord ALVANLEY expressed a strong opinion upon the question of costs ; though he did not decide it ; and the decree, reserving the costs generally, is perfectly correct. Where infants are concerned, I must hold, that as to so much of the suit, as has brought back the estate, and produced a re-sale, for their benefit, they must obtain that relief with costs. By this will very particular direc-

† Reg. Lib. B. 1748, folio 552.

tions are given as to the manner, in which the sale is to take place, and the division of the lots. These persons were therefore constituted trustees for sale for the benefit of these infants. The principle has often been laid down, that a trustee for sale may be the purchaser, in this sense ; that he may contract with his *cestui que trust*, that with reference to the contract of purchase they shall no longer stand in the relative situation of trustee and *cestui que trust* ; and the trustee, having through the medium of that sort of bargain evidently, distinctly, and honestly, proved, that he had removed himself from the character of trustee, his purchase may be sustained. But *in this case the trustee could not enter into such a contract ; as the *cestuis que trust* were infants ; and it would be most dangerous to hold, that a trustee to sell for the benefit of infants, bound to exert all his skill, and apply all his knowledge with strict integrity for their benefit, may exert that skill, and use that knowledge, for his own advantage ; and the principle, that the trustee shall not buy the trust property without the consent of the *cestui que trust*, is properly applied, when the very purchase made by the trustee is evidence, that he means to deal for his own advantage.

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[*602]

This lot was put up to sale by auction. My opinion, formed upon great consideration, is, that the circumstance, that the sale is by auction, makes no solid difference. The auctioneer is nothing more than an agent for the vendor. It is impossible to sift the propriety and justice of the transaction by an investigation of all the circumstances of conduct by the person, employing the auctioneer, when those circumstances can be known only to himself ; and, if this species of sale, by auction, is to destroy the principle, what happened in the case of *General Harris* proves distinctly, that there is no medium of sale, that may be made a wider inlet to fraud, than sales by auction.

These trustees did not go to the auction, avowing, that they went there with the purpose to bid ; and thereby giving distinct evidence to all persons attending for the same purpose, that the trustees, who ought to know the value, and must be supposed not to have brought the estate to sale, before they had obtained that information, were at least so far convinced of the value, as to be induced to bid. Instead of that they *employed a person, named

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Clarke, who did not then declare, for whom he bid; but afterwards declared himself a purchaser for another person, who declared himself a purchaser for one of the trustees.

The other estate consisted of leasehold premises, upon which a certain number of years were to run; and the actual rent was 700*l.* per annum: the infants to take the capital at the expiration of twenty-one years. The sum of 6,040*l.* was bid for that lot. It was put up to sale again; and the same person, Clarke, was the ostensible purchaser at the price of 6,310*l.* That is pretty decisive evidence of the consequences: upon the latter sale the trustees giving evidence upon their own part, that they had not at the former sale bid enough: therefore bidding more at the subsequent sale. After the second sale the fact, that the trustees were the purchasers, was disclosed. Then the bill in the first of these causes was filed: the trustees by their answer stating merely, that some of the estates were sold; but not disclosing, that they were the purchasers. The will was not proved in that cause. In the interim the bill was filed in the cause of *Campbell v. Walker*, on behalf of the persons entitled to the residue; to have the sales undone; and praying, that the estates might be re-sold. Lord ALVANLEY's opinion was, that the Court, acting for the benefit of the infants, should direct an inquiry, whether a re-sale would be for their benefit.

That direction is in one sense a confirmation of the principle, laid down by me, most frequently in bankruptcy; that, if it is for the benefit of the infants, that the purchase shall not be disturbed, the Court will not disturb it, and will disturb it, if that will be for their benefit. That principle, open to considerable objection, must be admitted; if a better principle cannot be found. The objection is, *that a great temptation to purchase is afforded to trustees: the question, whether the re-sale would be advantageous to the *cestui que trust*, being of necessity determined at the hazard of a wrong determination.

[*604]

The Master's report stated the value of one of these estates to be nearly double the price given by the trustee; and upon the re-sale it actually produced double: the value therefore not resting upon a mere speculative opinion; but established by that fact. The other estate did not produce much more or less than

the former sale : but that estate actually producing a rent of 700*l.* per annum, the profit by the re-sale must be considered with reference to the intermediate income between the sales, and the value of so much of the term as had run out ; and then the benefit to the infants is nearly in the same proportion under the second sale.

Upon the question of costs, I cannot lay down, that infants are to seek such relief against their trustees at the hazard of the expense attending it. With regard to so much of the suit therefore as relates to calling upon the trustees to submit to a re-sale, and the consequential directions, the relief must be given with costs. As to the other parts of the case, there is no ground for charging them with costs, with regard to those accounts, that must have been taken, if the sale had been conducted upon other principles. They must therefore have those costs, to which they would in the ordinary case have been entitled.†

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v.
WALKER.

REYNOLDS, EX PARTE.

(5 Vesey, 707—708.)

1800.
Dec. 24.

LOUGH-
BOROUGH,
L.C.

[707]

Assignees of a bankrupt removed on the ground, that one of them had purchased the bankrupt's estates under the commission for himself. A re-sale was directed ; and the purchaser to account for a profit gained by him upon a re-sale of part : but he was discharged from the purchase only conditionally, in case the re-sale should produce more.

THE prayer of this petition was, that the assignees under the commission of bankruptcy might be removed ; on the ground, that one of them had himself purchased the estates of the bankrupt under the commission by auction.

Mr. Romilly, in support of the petition, said, that according to the rule now established by *Whichcote v. Lawrence* and *Campbell v. Walker*,‡ the assignees cannot be the purchasers ; even supposing their conduct to be perfectly fair ; which he denied.

The *Attorney-General*, for the assignee, who purchased, insisted, that the conduct of the assignees was fair ; but admitted,

† See next case.

‡ See preceding case.

REYNOLDS, *Ex parte*, that according to the rule now established they could not be the purchasers.

LORD CHANCELLOR said, clearly they could not; and ordered that they should be removed.

Mr. Piggott, for the other assignee, who did not purchase, contended that the order ought not to extend to him.

LORD CHANCELLOR :

[*708] He permitted his co-assignee to purchase; and being a party in the business, it is not fit he should manage *the affairs of the creditors. Therefore both of them must be discharged.

Direct the estates to be resold; and this petition to stand over in the meantime; for if the estates should not sell for more than the assignee has given, I shall hold him to his purchase; and as it appears, that he has sold part for 75*l.* more than he gave for it, he must also account for that. I set aside the purchase only conditionally; in case the future sale shall produce more.

1800.
Dec. 5.

LOUGH-
BOROUGH,
L.C.

[688]

JACKSON v. CATOR.†

(5 Vesey, 688—692)

Injunction to restrain the landlord from cutting ornamental trees in a lawn during the term, upon his conduct; amounting to a consent to the tenant's plan of improvement, laying out the lawn, &c.

A deed not to be varied by parol evidence of the actual agreement.

Sending a surveyor to mark out trees is a sufficient ground for an injunction.

THE plaintiff was assignee of a lease, dated the 24th of October, 1794, of certain fields, adjoining his dwelling-house at Beckenham in Kent, for thirty years, granted by the defendant; reserving all trees and timber-like trees and pollards and all plants and shrubs, that are or may be planted. In 1795 or 1796 the plaintiff laid part of the premises, to the extent of eleven or twelve acres, into a lawn and pleasure-ground; and for that purpose removed a kitchen-garden and hedge-rows at a considerable expense; planting shrubberies, and making walks, &c.

† *McManus v. Cooke* (1887) 35 Ch. D. 631, 695, 53 L. J. Ch. 662.

The bill prayed an injunction to restrain the defendant from cutting down any of the trees upon the demised premises for the remainder of the term.

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CATOR.

The defendant by his answer admitted, he was informed by the plaintiff of his intention to make such alterations; that he (the defendant) saw the grounds, while the alterations were making; and at the request of the plaintiff met his surveyor; and he stated, that to oblige the plaintiff he consented, that the trees the surveyor considered necessary to be cut according to the plan should be cut; and he consented generally to such alterations as the plaintiff pleased; and the trees cut were carried away by the defendant as owner.

The surveyor proved the alterations; that the land was converted from fields into a lawn and paddock, &c.; and that the *cutting down the trees now left in clumps would destroy the beauty of the ground; that the defendant met him upon the premises; and consented to cutting down some trees and leaving others in clumps; as the plaintiff should please; and seemed pleased with the plan.

[*689]

An injunction had been obtained; and continued to the hearing. The bill also took another ground; insisting, that the right of the landlord to enter, cut, and carry away the trees, was not according to the original agreement, in support of which the plaintiff went into parol evidence of a conversation previous to the execution of the lease; in which the defendant assured the lessee, he should not cut the timber; and only reserved it, in order that that lease might be uniform with his other leases. That part of the bill was given up at the hearing; and the relief sought was confined to the ornamental trees upon the lawn, &c.; which was laid out in the view and with the consent of the defendant. The defendant denied having an intention of cutting the trees: but he had sent a surveyor to mark them.

The Attorney-General, Mr. Romilly, and Mr. Bell, for the plaintiff:

The principle of equity is, that, when a person has stood by, seeing the act done, or has consented to it, he shall not exercise

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his legal right in opposition to that permission. *The East India Company v. Vincent*;† *Stiles v. Cowper*.‡ In *Brydges v. Kilburne*,§ an injunction to restrain waste was refused under the following circumstances. In 1725 a lease had been granted; and a logwood-mill was erected. In 1775 the lease was renewed; and in the renewed lease the mill was included under the description of a logwood-mill. Afterwards the lessee altered it to a cotton-mill of great value. The bill was filed by the landlord; contending, that the alteration of the logwood-mill to a cotton-mill, though of great value, was waste; and praying an injunction. There was no stipulation in the lease of 1725 as to what the mill should be. Upon the conduct of the plaintiff in lying by, and seeing the cotton-mill erected, and afterwards approving of the defendant's planting about the mill Mr. Justice BULLER refused the *injunction; and mentioned *The King v. The Inhabitants of Buttern*,|| and other express authorities, that where a man encourages another to lay out money upon the supposition, that he never means to exercise his legal rights, this Court will not permit him to exercise them. That was also the opinion of the Court of Exchequer in *Hardcastle v. Shafto*.¶ This injunction therefore ought to be continued during the remainder of the term; and the decree ought to be made with costs; except as to that part of the bill, for which it is admitted there is no ground.

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LORD CHANCELLOR :

There was a case, I do not know whether it came to a decree, against Mr. George Clavering; in which some person was carrying on a project of a colliery; and had sunk a shaft at a considerable expense. Mr. Clavering saw the thing going on; and in the execution of that plan it was very clear, the colliery was not worth a farthing without a road over his ground; and, when the work was begun, he said, he would not give the road. The

† 2 Atk. 83.

‡ 3 Atk. 692.

§ June 6, 1792, cited from a manuscript note, upon a motion for an injunction to restrain waste, before

Mr. Justice Buller, sitting for the Lord Chancellor.

|| 6 Term Rep. B. R. 554, 3 B. R. 261.

¶ 1 Anst. 184.

end of it was, that he was made sensible, I do not know whether by a decree or not, that he was to give the road at a fair value.

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For the plaintiff :

In the case of *Mr. Russell*, another case of a colliery, your Lordship restrained the proceedings upon the same ground.

Mr. Mansfield and *Mr. Richards*, for the defendant :

The cases cited are not applicable. They all go upon this: that the party was availing himself of money laid out; having permitted the other to act, as if the lease he had was a good lease. In the case of the cotton-mill the answer was, that the plaintiff had suffered the defendant to lay out his money upon that project; and therefore should let it go on. In this case the plaintiff knew, this defendant could exercise this right. Contemplating these improvements why did not he enter into some communication upon the subject? Not a word passes. The right remains in exactly the same state. It is his own fault for not stipulating, that these trees never should be cut. A decree restraining this clear legal right, as to which no treaty ever took place, would go farther than the Court has ever gone. There is no evidence that the plaintiff *would not have made a lawn, if these trees had not been on the land. It does not appear, therefore, that expense has been incurred in respect of the supposed engagement of the defendant not to cut the trees; and in that point this case is distinguished from all the others. There can be no objection to taking an account of these trees. The evidence does not go farther than that: it is not said, that there is any intention to cut them; and the defendant denies such intention. The ground of the bill therefore is, *quia timet*, without reason. Much the greatest part of the bill is that, now given up, attempting to correct the lease by parol evidence.

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The *Attorney-General*, in reply :

In *Brydges v. Kilburne* the plaintiff sustained a real injury; for his house had a view of the water in Beddington Park; which was intercepted by the cotton-mill: but as he had

JACKSON ^{r.} suffered the thing to go on, that did not prevail. Why did not
CATOR. this defendant say, he would cut these trees.

LORD CHANCELLOR :

I never ask more upon an application for an injunction than that a surveyor has been sent to mark out trees. I do not wait, till they are cut down.

I do not feel, that there is any distinction, that would take the case out of the principle of all these cases, that have been alluded to ; and more particularly that of *Brydges v. Kilburne*. That case comes very nearly up to this ; for there was a demise of the logwood-mill at a given rent. Without doubt Brydges had a right to say, the defendant should not put a cotton-mill there ; for it might be extremely prejudicial ; bringing a manufacture there that might be extremely burthensome to the parish. The absolute right in this case goes as well to cut down all, that the plaintiff plants. The reservation of the timber is in very ample terms. It would be wrong : that proposition strikes everyone forcibly ; not, that it would be ungentleman-like, but, dishonest, morally wrong ; binding a man of a much coarser nature than this defendant. In the case of the cotton-mill it was taking advantage of an interest created. Is it not just as competent to the Court to prevent an injury arising from mere spite as to prevent him from doing it in order to put money in his pocket ? The objection, that the plaintiff knew the infirmity of the title, and should have taken a security, applies to all the cases : but it is very strong here ; *for he must have seen, his intention to beautify the place could not be executed without the assent of the defendant. He acts upon it ; sends his surveyor ; and it is a solid improvement of the estate. The defendant has the benefit of it ; ameliorating, not merely beautifying. The only question is, whether he shall be allowed to indulge his humour to exercise that right under such circumstances. I have no difficulty in enjoining him : but it is upon his conduct since the execution of the lease, not upon the evidence of the conversation as to the agreement.

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Both parties pressing for costs, the LORD CHANCELLOR said, the

decree must be without costs undoubtedly; the other part of the bill being clearly wrong; and it would be better to give no costs on either side than to inflame them farther by giving costs each way.

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v.
CATOR.

THE MARQUIS OF HERTFORD v. BOORE.

(5 Vesey, 719—720.)

1801.
Feb. 6.

LOUGH-
BOROUGH,
L.C.

[719]

A vendor cannot come at any distance of time for a performance: but upon a bill, filed fourteen months after the correspondence upon the objections to the title ceased by the defendant's returning no answer to the last letter, calling for a distinct answer, and threatening a bill, and the auctioneer not having been called on to return the deposit, it was referred to the Master.

THE bill was filed for the specific performance of an agreement for the purchase of an estate. Upon the 25th of October, 1792, the defendant purchased by auction an estate at Exning in the county of Stafford, belonging to the Marquis of Hertford, for 780*l.*; and paid a deposit of 5 per cent. By the conditions of sale the remainder of the purchase-money was to be paid, and the conveyance executed, on or before the 5th of April following. The abstract was delivered on the 26th of February; and objections were taken to the title by the defendant's solicitor, as not covering the whole of the premises described in the particular. Upon that subject a correspondence took place between the solicitors; beginning upon the 15th of April, 1793. The vendor went upon evidence of uninterrupted possession for sixty-seven years of the acres in question, and, since 1749, under a receiver appointed by the Court. The correspondence, as it appeared in evidence by admission, continued down to the 3rd of December, 1793; and the plaintiff's solicitor by a letter, dated the 29th of November, 1793, threatened to file a bill; which was not actually filed till the 25th of January, 1796.

The defendant by his answer submitted upon the correspondence, that by the conduct of the plaintiffs and their inability or neglect to shew a good title to the premises the defendant has suffered material inconvenience; having purchased the premises for his residence; and that he was induced to consider the con-

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v.
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tract abandoned ; and that at this distance of time and under the circumstances he ought not to be compelled to perform it.

At the hearing the plaintiffs proved a continuance of the correspondence down to November, 1794 ; in which month the last letter was written by the plaintiff's solicitor ; calling for a distinct answer ; and saying, that otherwise he must be under the necessity of filing a bill. To that letter no answer was returned by the defendant, nor was any notice given to the plaintiff, that he considered the contract abandoned : nor had he brought any action for the deposit ; which still remained in the hands of the auctioneer.

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The *Attorney-General* and *Mr. Fonblanque* for the plaintiffs :

Mr. Piggott and *Mr. Raynsford*, for the defendant :

The delay, that occurred, since the bill was filed, certainly was accidental ; proceeding from the derangement of the affairs of the defendant's solicitor ; who absconded some time ago. No advantage therefore can be taken of that. But the time, that elapsed previously to the filing of the bill from the termination of the correspondence, was a period of fourteen months ; which is quite a sufficient answer to the bill within the principle established by *Lloyd v. Collett*.† The observation‡ of the MASTER OF THE ROLLS in *Fordyce v. Ford*, that he hopes, it will not be gathered from hence, that a man is to enter into a contract, and think, that he is to have his own time to make out his title, applies particularly to this case.

The *Attorney-General*, in reply :

In all those cases, in which the Court held, that the vendor

† 4 Br. C. C. 469. In *Milward v. Earl Thanet*, at the Rolls, March the 24th, 1801, the bill for a specific performance was dismissed. The parties differed as to the construction of the agreement, and the bill was delayed for seven years. Lord ALVANLEY, then Master of the Rolls, observed, that Lord KENYON was the first, who set himself against the

idea that had prevailed, that, when an agreement was entered into, either party might come at any time : but that it is now perfectly known, that a party cannot call upon a court of equity for a specific performance, unless he has shewn himself ready, desirous, prompt, and eager.

‡ 4 Br. C. C. 498.

had not a right to compel a performance of the contract, he had not produced a title. In this case a good title was made early.

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LORD CHANCELLOR :

I am very much inclined to the general idea adopted in these cases ; that a vendor is not to come at any distance of time : but in this case they took steps with expedition ; put the defendant in possession of the abstract ; to which objections were taken ; which might have been obviated. Every thing was done by the plaintiffs to avoid a suit : the last act, calling for a distinct answer ; and saying, that otherwise they must be under the necessity of filing a bill. They take a good deal of time upon that : but one can easily imagine, circumstances might have happened, that would have made it peevish to have done it immediately.

I do not think, I can avoid sending this to the Master.

LADY ELIBANK v. MONTOLIEU.†

(5 Vesey, 737—744.)

Upon the bill of a married woman, entitled to a share of the personal estate as one of the next of kin of the intestate, against her husband, and the administrator, the latter claiming to retain towards satisfaction of a debt by bond from the husband to him, it was declared, he was not entitled to retain ; but that the plaintiff's share was subject to a farther provision in favour of her and her children ; the settlement on her marriage being inadequate to the fortune she then possessed ; and it was referred to the Master to see a proper settlement made on her and her children ; regard being had to the extent of her fortune and the settlement already made upon her.

In 1795 Lady Cranstown died intestate ; possessed of large personal property ; leaving two brothers and two sisters her next of kin. Lewis Montolieu, one of her brothers, took out letters of administration to her.

The bill was filed by Lady Elibank, one of the sisters, against her husband Lord Elibank and against Montolieu ; praying an account of the plaintiff's share, and that it may be settled on her and her family.

† *In re Briant* (1888) 39 Ch. D. 471, 57 L. J. Ch. 953.

1799.

April 16, 19.

1801.

Feb. 19.

LOUGH-
BOROUGH,
L.C.

[737]

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[738]

The defendant Montolieu by his answer claimed to retain Lady Elibank's share towards satisfaction of the debt due to him from Lord Elibank by two bonds: one dated the 31st of May, 1788, for 12,217*l.* 9*s.* 9*d.*: the other, dated the 14th of November, 1794, for 1,000*l.*; upon the ground of the provision made for the plaintiff by the settlement previous to her marriage with the defendant Lord Elibank in 1776. By that settlement the sums of 12,000*l.* and 5,000*l.* New South Sea Annuities were settled in trust for Lord Elibank for life; and after his decease for Lady Elibank for life as a jointure and in lieu of dower or thirds; and after the decease of both in trust for the children. The sum of 4,000*l.* New South Sea Annuities were settled in trust for her separate use for life, and after her death for her children; and 2,000*l.* 5 per cent. Bank Annuities for her separate use for life, and after her death for her children, as she should by will appoint. All these sums were her property before marriage. The settlement also gave her some contingent interests.

In the entail of Lord Elibank's estate a power was reserved to charge 200*l.* a-year jointure, and 50*l.* a-year to each of his younger children, not exceeding in the whole 200*l.* a-year, under a condition, that the estate should be chargeable with only one jointure at a time; and that, if the power of charging for children had been exercised by a preceding heir in tail, the heir in possession should not charge for his younger children. The defendant Lord Elibank by his answer stated, that a former Lord Elibank did charge to the full extent of that power.

The *Solicitor-General*, Mr. Grant, and Mr. Alexander, for the plaintiff:

The plaintiff desires an account of the personal estate of Lady Cranstown; and that a provision may be made for her. The defendant Montolieu insists, that is not to be done; because he is a creditor of her husband; contending, that this case is out of the usual rule, upon which the Court acts for a wife; and that there is no necessity to come to this Court: the fortune not being in Court, nor under the control of the Court. * * *

[740]

Suppose, the husband could sue at law, this defendant could not make this defence; that he will not pay; but will keep this

fund in satisfaction of the husband's debt to him ; for it is clear, at law a creditor of the husband cannot set-off the husband's debt against the demand of the husband and wife ; and being entitled in her right he must sue with her. Still less should he be permitted to retain in equity upon that ground ; for where he is permitted to avail himself of the legal right, the right must be clear. * *

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[In the present state of the law it is thought unnecessary to state the arguments of counsel more fully, or to refer to the numerous earlier cases cited by them.]

The Attorney-General, Mr. Mansfield, and Mr. W. Agar, for the defendant Montolieu :

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The objection to the form of the suit would merely occasion delay ; and a bill would be filed in their joint names.

There is no case, in which the Court has decreed against a trustee, who had paid the husband without suit, that the wife had an equity to charge the trustee. * * All the instances are, where the person has refused to pay, unless compelled by a court of equity. That gives the jurisdiction ; and none can be produced, where the executor has been prevented from paying to the husband, if he chose to do so ; or where having paid to the husband he has been charged as upon a breach of duty by reason of that payment, and made to refund. * *

This case is certainly new in the circumstance, that the husband is debtor to the other defendant : but if he could have paid the husband, and the Court would not have made him refund, there can be no difference from his retaining against the husband. Suppose, Lord Elibank had sued, and the equity of the wife, having a very large provision, was out of the question, this Court would never compel the administrator to pay that share to his debtor, unless the latter would allow the debt. This Court goes infinitely beyond Courts of Law as to set-off. It would be strange to permit the wife to intervene against the administrator retaining, where she could not intervene to prevent his paying her husband and the husband paying his debt out of that. * * There is no instance of a bill by the wife against her husband to have the property settled to her separate

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use; which is the object of this bill. This property, though subject to the equity of the wife, is the property of the husband.

The Solicitor-General, in reply :

* * The rule is clear, that, wherever the husband becomes entitled to sue in right of his wife, she must consent, that he shall have it, or he is under the necessity of making a settlement; unless the Master is of opinion, that the settlement already made by the husband is such as to answer all the purposes of the wife. * *

[743] LORD CHANCELLOR :

I wish to consider this case.

1801.
Feb. 19. LORD CHANCELLOR :

The only difficulty I had in this cause was upon the form of the suit; whether a married woman by her next friend could be the plaintiff in this Court. With respect to the point made by the answer of Montolieu, that he had a right to retain against the debt of the husband, being possessed of the fund as administrator, and the wife being one of the next of kin, I am very clearly of opinion, the defendant had no right to retain. The administrator is trustee for the next of kin: the plaintiff being one of them, if she has any equity against her husband with regard to this money, that equity will clearly bar any right of retainer he can set up to the property, of which he became administrator. With respect to the only difficulty I had, upon the point of form, if she is entitled, and there is no way of asserting her right against her husband except by a bill, that objection, I think, does not weigh much. If the defendant Montolieu had done what would have been the natural thing, and the right thing, and what he certainly would have done, but for his own interest, he would have been the plaintiff, desiring the Court to dispose of the fund, and for her benefit, to protect her interest in it. Then upon all the circumstances it is very clear, if it had come before the Court, it would have been matter of course to have pronounced upon her equity upon the bill of the administrator, praying, that the money in his hands might be properly disposed of; and I would not have suffered this money to be paid to Lord Elibank without making a

provision for her; for the provision upon her marriage was clearly not adequate to her fortune; and it is clear, that provision was made upon the expectation, that by circumstances to occur in his family there would be an opportunity to do better for her at a future period. The difficulty was, that it is very unusual in point of form; the bill coming on the part of the wife instead of the husband.

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Declare, that the defendant Montolieu is not entitled to retain in satisfaction of the debt due from the defendant Lord Elibank to him; but that the distributive share of Lady Cranstown's fortune, accruing to the plaintiff as one of her next of kin, is subject to a farther provision in favour of the plaintiff and her children; the settlement made upon her marriage being inadequate to the fortune she then possessed. Refer it to the Master to take the accounts, and to see a proper settlement made upon the plaintiff and her children; regard being had to the extent of her fortune and the settlement already made upon her.

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[For the subsequent proceedings in 1804 by the children of Lady Elibank consequent upon her death (10 Ves. 84) see a later volume of the Revised Reports.]

SOMERVILLE v. LORD SOMERVILLE.

BAYNTUN v. LORD SOMERVILLE.†

(5 Vesey, 750—792.)

The succession to the personal estate of an intestate is regulated by the law of that place, which was his domicile at the time of his death. For that purpose there can be but one domicile; and the *Lex loci rei sitæ* does not prevail.

The mere place of birth or death does not constitute the domicile. The domicile of origin, which arises from birth and connections, remains, until clearly abandoned and another taken.

In the case of Lord Somerville, of two acknowledged domicils, the family seat in Scotland, and a leasehold house in London, upon the circumstances the former, which was the original domicile, prevailed.

A new domicile cannot be acquired during pupillage, or, until the person is *sui juris*.

THE question in these causes was, whether the distribution of the personal estate of the late Lord Somerville, who died intestate, seized of real estates in Scotland and in Gloucestershire, and

† *Ex parte Cunningham* (1884) 13 Q. B. D. 418, 53 L. J. Ch. 1067.

1801.
Jan. 24, 26,
27.

Feb. 23.

ARDEN, M.R.
for the
LORD CHAN-
CELLOR.

[750]

SOMERVILLE possessed of personal property in the English funds to a very large amount, should be made according to the law of Scotland or the law of England. The claimants by the law of Scotland were his Lordship's nephews and nieces of the whole blood, exclusive of Lord Somerville, as being the heir at law entitled to the real estates. They were the children of the intestate's deceased brother and sister of the whole blood, Colonel Somerville and Ann Whichmore Burgess. Sir Edward Bayntun, half-brother to the intestate, being the surviving son of Lady Somerville by a former marriage, and two nephews and two nieces, of the half-blood, being the children of a deceased brother and sister of the intestate by a former marriage, claimed to participate in the distribution under the law of England. Lord Somerville obtained letters of administration.

The following circumstances were established by the evidence.

[*751] That branch of the Somerville family, from which the late Lord was directly descended, had been wholly settled in Scotland above *six centuries. His father, James, Lord Somerville, first came to England in 1721 at the age of twenty-three, for the purpose of prosecuting his claim to the barony of Somerville; which he established in May, 1723. In 1724 he married Mrs. Rolt of Spy Park; where he resided with her on her estate till 1726; when he returned to Scotland. His daughter Ann was born during that residence in England. He continued in Scotland, where his two sons the late Lord Somerville and Colonel Somerville were born, till 1731; in which year he went to Bristol on account of Lady Somerville's health. In 1732 he returned to Scotland; and continued there till Lady Somerville's death in 1734; when he went to England to bury her and to surrender her estate to Sir Edward Bayntun, one of her sons by a former marriage. In 1736 Lord Somerville married again; and immediately returned to his residence in Scotland; where he continued till 1741; when he was elected one of the Sixteen Peers; and came up to attend Parliament; and resided three winters in London for that purpose, going in summer to his estate in Scotland. In 1744 being appointed a Lord of Police in Scotland, he went to reside there; discontinuing from that time his Parliamentary attendance. He continued in Scotland, till he

went to England in 1760 or 1761 to be presented to the King and to visit his daughter. After passing six weeks in England on that occasion he returned to Scotland; and never again quitted it; dying at his house there in 1765. His residence in Scotland was at the family seat, called The Drum, or Somerville-House, in the summer, and at apartments, which he had in Holyrood House, in winter.

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of
 LORD
 SOMERVILLE.

The late Lord Somerville was born on the 22nd of June, 1727, in Scotland, either at Somerville House, or at Good-Trees, an old mansion in the neighbourhood, rented by his father, while the house was re-building. He remained there till the age of nine or ten years; in the course of which period he was at school at Dalkeith, and afterwards at Edinburgh. At the age of nine or ten he was sent into England to Mr. Somerville in Gloucestershire. He was at school there for some time; afterwards in June, 1742, he went to Westminster School; which he quitted at Christmas, 1743. He then went to Caen in Normandy for the purpose of education; where he remained till the age of eighteen; when upon the rebellion breaking out in Scotland in 1745 being sent for by his father he returned to Scotland; joined the royal army as a volunteer; and was present at the battles of Preston Pans and *Culloden; at which he served as an aide-de-camp to Generals Cope and Hawley. He continued in the army till the peace in 1763; and at different times during that period was in England, Scotland, and Germany, wherever his regiment happened to be, either in quarters or on service. Soon after quitting the army in 1763 he went to Scotland, to Somerville House; and his father settled an annuity upon him. He then went abroad. In September, 1765, on account of his father's illness he returned to Scotland; was present at his funeral in December in that year; and continued in Scotland about six months afterwards; but not succeeding in an application for his father's apartments in Holyrood House he went to London; but did not turn off any of the servants at Somerville House. From this period, in 1766, there was no evidence as to the actual residence till 1778 or 1779,† farther than that he passed the winter in London and the

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† The fact was, that during the former part of that period Lord Somerville had furnished lodgings in London; and during the latter part

SOMERVILLE summer at Somerville House. In 1779 he took a lease of a house in Henrietta Street, Cavendish Square, for twenty-one years, determinable at the end of seven or fourteen years, at a rent of 84*l.* a year. He continued to occupy this house as his winter residence till his death; going every year to Somerville House for the summer; and dividing the year nearly equally between them. The landlord of the house having purchased the ground-lease, of which thirty-six years were unexpired at Midsummer, 1787, Lord Somerville endeavoured to get him to relinquish it for a premium; and expressed regret at the refusal. Being assessed to the taxes at 90*l.* per annum he appealed; and was reduced to 84*l.* per annum. About ten years before his death he was elected one of the Sixteen Peers; and he attended his Parliamentary duty every winter.

In Scotland Lord Somerville's establishment and style of living were suitable to his rank and fortune. In London he had only one or two female servants; and brought two men servants from Scotland; taking them back with him; and using job horses occasionally. His manner of living here was very private; seeing no company; dining usually at a club; and keeping his servants on board wages. The house was out of repair; and furnished upon a very limited scale. The furniture, with the wine, coals, and plate, sold only for 66*l.* 7*s.* 1*d.* and the fixtures [*753] for 73*l.* 10*s.* To some of his friends he declared repeatedly, that he considered his residence in London only as a lodging house, and a temporary residence during the sitting of Parliament; and spoke of Scotland as his residence and home, where he was born, with the warmth of a native; and he often complained with acrimony, that in any disputes, which he had, which came before the Session, it appeared to be a disadvantage to him residing so little among them. About a month before his death Colonel Reading urged him to make a will; observing, that it would be cruel to leave his natural children without provision; upon which he said he meant to take care of them and also of his brother's younger children; and soon after this conver-

occupied the house, of which he afterwards took a lease; which appeared by the parish rates since 1773, beyond which they could not be found.

sation the intestate told Colonel Reading, (the deponent,) that he had seen Sir James Bland Burgess; who had alarmed him by telling him, if he died without a will, his personal estate would be divided among the several branches of his family; which he much deplored; and afterwards he said, he should soon go to Scotland; and would then make his will.

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Soon after that conversation Lord Somerville died suddenly at his house in London in April, 1796, during the sitting of Parliament. In the books of the Bank of England he was described as of Henrietta Street, Cavendish Square.

Elizabeth Dewar, who had been housekeeper at Somerville House, by her depositions stated, that she had heard the intestate say, he was an Englishman; and when she told him, that when speaking against Scotland, he was speaking against his own country, he would answer, that he was born in Scotland: he was educated in England: his connections were English; that he had no friend in Scotland; and everything he did was after the English fashion. The deponent had heard him say, his reason for going to Scotland was, that he might be at his estate; that he did not like it; but had promised his father, when dying, that he would live one half of the year in Scotland, and the other in England; that he considered himself an Englishman; that his estate in England was preferable to that in Scotland; that he preferred England; and would never visit Scotland except on account of the promise to his father; and that he did not care though Somerville House were burnt; and this he frequently said in conversation with the witness.

There was some farther slight evidence of expressions importing a preference of England; and that he considered himself an Englishman.

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The *Attorney-General*, the *Solicitor-General*, Mr. *Newbolt*, and Mr. *M'Intosh*, for the plaintiffs in the first cause; Mr. *Mansfield*, Mr. *Adam*, and Mr. *Lockhart*, for defendants in the same interest; claiming as next of kin of the whole blood by the law of Scotland.

Mr. *Piggott*, Mr. *Lloyd*, Mr. *Romilly*, Mr. *Sutton*, and Mr. *Steele*, for the defendants, claiming under the Law of England.

SOMERVILLE *THE MASTER OF THE ROLLS:*

v.
LORD
SOMERVILLE.

Feb. 23.
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This case has been extremely well argued on all sides ; and I have the satisfaction of thinking, I have received every information, that either industry or abilities could furnish. The question is simply as to the succession to the personal estate of the late Lord Somerville. It is in some respects new : so far as it is a question between two acknowledged domicils. In the late cases the question has been, whether the first domicil was abandoned ; and where at the time of the death the sole domicil was : but here the question is, which of two acknowledged domicils shall preponderate ; or rather, which is the domicil ; according to which the succession to the personal estate shall be regulated. Questions upon the law of succession to personal estate have been very frequent of late in this country ; and unless the Legislature interposes, which I sincerely hope they will, to assimilate the law of the whole island upon this subject, such questions may be expected very frequently to occur.

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In the course *of a few years there have been four cases in the House of Lords, and one in this Court. I have been favoured with the opinions delivered by Lords THURLOW and LOUGHBOROUGH ; the former in *Bruce v. Bruce* ; † the latter in *Ommaney v. Bingham*, ‡ the case of *Sir Charles Douglas*. I have very fully considered all the cases, and the opinions of those two learned Lords, and the authorities referred to in the printed cases, and also all the authorities referred to by the foreign jurists ; which were very properly brought forward on this occasion. It is unnecessary to enter into a comment upon all these authorities. It will be sufficient to state the rules, which I am warranted to say result, with the reasons for adopting them in this case.

The first rule is that laid down by those learned Lords, adopted in the House of Lords, and admitted in this argument to be the law, by which the succession to personal estate is now to be regulated : whatever might have been the opinion of the Courts of Scotland ; which certainly at one time took a different course. That rule is, that the succession to the personal estate of an intestate is to be regulated by the law of the country, in which he was a domiciled inhabitant at the time of his death ; without any regard whatsoever to the place either of the birth or

† 7 Br. P. C. 566.

‡ 2 B. & P. 229, n.

the death, or the situation of the property at that time. That is the clear result of the opinion of the House of Lords in all the cases I have alluded to : which have occurred within the few last years. This, I think, is not controverted by the counsel on either side : but it was said, that law could prevail, and be applied, only, where such domicile can be ascertained ; and that I admit.

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The next rule is, that though a man may have two domicils for some purposes, he can have only one for the purpose of succession. That is laid down expressly in *Denisart* under the title *Domicil* ; that only one domicile can be acknowledged for the purpose of regulating the succession to the personal estate. I have taken this as a maxim : and am warranted by the necessity of such a maxim ; for the absurdity would be monstrous, if it were possible, that there should be a competition between two domicils as to the distribution of the personal estate. It could never possibly be determined by the casual death of the party at either. That would be most whimsical and capricious. It might depend upon the accident, whether he died in winter or summer, and many *circumstances not in his choice, and that never could regulate so important a subject as the succession to his personal estate.

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The third rule I shall extract is, that the original domicile, or, as it is called, the *forum originis*, or the domicile of origin, is to prevail, until the party has not only acquired another, but has manifested and carried into execution an intention of abandoning his former domicile and taking another as his sole domicile. I speak of the domicile of origin rather than that of birth ; for the mere accident of birth at any particular place cannot in any degree affect the domicile. I have found no authority or dictum, that gives for the purpose of succession any effect to the place of birth. If the son of an Englishman is born upon a journey in foreign parts, his domicile would follow that of his father. The domicile of origin is that arising from a man's birth and connections.

To apply these rules to this case. It cannot be disputed, that Lord Somerville's father was a Scotchman. He married an English lady ; returned to Scotland ; repaired his family house ; occupying another in the neighbourhood in the mean time ; and

SOMERVILLE he had apartments in Holyrood House. For the first part of his
 v. life after his marriage he seems to have made Scotland almost
 LORD his sole residence: nor was it contended, that during that period
 SOMERVILLE. he had acquired any other. The father being then without doubt
 a Scotchman, the son was born; and at the age of nine or ten
 was sent into England for education, and from thence to Caen
 in Normandy. It cannot be contended, nor do I think it was,
 that during the state of pupilage he could acquire any domicile
 of his own. I have no difficulty in laying down, that no domicile
 can be acquired, until the person is *sui juris*. During his con-
 tinuance in the military profession I have not heard it insisted,
 that he acquired any other domicile than he had before. Upon
 his father's death and his return to Scotland, a material fact
 occurs; upon which great stress was laid on both sides. It is
 said, his father's dying injunctions were, that he should not
 dissolve his connection with Scotland. In the subsequent part
 of his life he most religiously adhered to those injunctions. But
 it is said, that in conversation he manifested his preference of
 England; and that if it had not been for those injunctions of
 his father he would have quitted Scotland. Admit it. That in
 my opinion is the strongest argument in favour of Scotland; for,
 whether willingly or reluctantly, whether from piety or from
 [*788] *choice, it is enough to say, he determined to keep up his con-
 nection with that country; and the motive makes not the least
 difference.

Then see, how after his father's death he proceeded to establish
 himself in the world. From that time undoubtedly he was
 capable of establishing another domicile. Until that time there
 could be no doubt, that the surplus of his personal estate must,
 if he had died, have been distributed according to the law of
 Scotland. Then, to trace him from that time. It appears, he
 had determined not to abandon his mansion house: so far from
 it, he made overtures with a view to get apartments in Holyrood
 House; from which I conjecture, that, if that application had been
 granted, he might have been induced to spend more time than
 he did in Scotland. He came to London. I will not inquire,
 how soon he took a permanent habitation there: but I admit,
 from that time he manifested an intention to reside a considerable

part of the year in London, but also to keep up his establishment in Scotland, and to spend as nearly as possible half of the year in each. He took a lease of the house, evidently with the intention to have a house in London as long as he lived; with a manifest intention to divide his time between them. It is then said, there are clearly two domicils alternately in each country. Admit it: then the question will arise, whether in case of his death at either, that makes any difference. It was contended in favour of the English domicil, that in such a case as that, of two domicils, and to neither any preference, for it cannot be contended, that the domicil in Scotland was not at least equal to that in England, except the *lex loci rei sitæ* is to have effect, the death should decide. There is not a single dictum, from which it can be supposed, that the place of the death in such a case as that shall make any difference. Many cases are cited in Denisart to shew, that the death can have no effect; and not one, that that circumstance decides between two domicils. The question in those cases was, which of the two domicils was to regulate the succession; and without any regard to the place, where he died. These cases seem to prove, and if necessary, I think, it may be collected, that those rules have prevailed in countries, which being divided into different provinces, frequently afford these questions. The fair inference from them is, that, as a general proposition, where there are two contemporary *domicils, this distinction takes place; that a person not under an obligation of duty to live in the capital in a permanent manner, as a nobleman or gentleman, having a mansion house, his residence in the country, and resorting to the metropolis for any particular purpose, or for the general purpose of residing in the metropolis, shall be considered domiciled in the country: on the other hand a merchant, whose business lies in the metropolis, shall be considered as having his domicil there, and not at his country residence. It is not necessary to enter into that distinction; though I should be inclined to concur in it. I therefore forbear entering into observations upon the cases of *Mademoiselle De Clermont Santoignon* and the *Count De Choisieul*, and the distinction as to the acts of the former, describing herself as of the place in the country.

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The next consideration is, whether with reference to the property or conduct of Lord Somerville there is anything shewing, he considered himself as an Englishman. It was said, for the purpose of introducing the definition of the domicil in the Civil Law, "*Ubi quis larem rerumque ac fortunarum suarum summam constituit*," that the bulk of his fortune was in England; and the description in the bank books was relied on. I lay no stress whatsoever on that description in those books or in any other instrument; for he was of either place; and was most likely to make use of that, to which the transaction in question referred. It was totally immaterial, which description he used. It is hardly possible to contend, that money in the funds, however large, shall preponderate against his residence in the country and his family seat. It is hardly possible, that should be so annexed to his person as to draw along with it this consequence. Upon nice distinctions I think it might be proved, that his principal domicil must be considered as in Scotland. Great stress, and more than I think was necessary, was laid upon the manner, in which he passed his time in each place. There is no doubt, the establishment in Scotland was much greater than that in London. In my opinion Bynkershock was very wise in not hazarding a definition. With respect to that to be found in the Civil Law, the words are very vague; and it is difficult to apply them. I am not under the necessity of making the application; for my opinion will not turn upon the point, which was the place, where he kept the sum of his fortune. It is of no consequence, whether more or less money was spent at the *one place or the other; living alternately in both. Some time before his death he talked of making his will in Scotland. That circumstance is decisive, that his death in England was merely casual, not from intention. The case then comes to this. A Scotchman by birth and extraction, domiciled in Scotland, takes a house in London; lives there half the year; having an establishment at his family estate in Scotland, and money in the funds; and happens to die in England. I have no difficulty in pronouncing, that he never ceased to be a Scotchman: his original domicil continued. It is consistent with all the authorities and cases, that, where a man has two domicils, the domicil

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he originally had shall be considered his domicile for the purpose of succession to his personal estate, until that is abandoned, and another taken.

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LORD
SOMERVILLE.

It is surprising, that questions of this sort have not arisen in this country, when we consider, that till a very late period, and even now for some purposes, a different succession prevails in the Province of York. The custom is very analogous to the law of Scotland. Till a very late period the inhabitants of York were restrained from disposing of their property by testament. The alteration may account for the very few cases occurring; for very few persons of fortune die intestate; though it has happened in this case. Before that power of disposing by testament such cases must have been frequent; and the question then would have been, whether during the time the custom and the restraint of disposing by testament were in full force, a gentleman of the county of York, coming to London for the winter, and dying there intestate, the disposition of his personal estate should be according to the custom or the general law. One should suppose it hardly possible, that some such case had not occurred. I directed a search to be made in the Spiritual Court and the Court of Chancery; where it was most likely that such a case would be found: but I do not find, that any such case has occurred. Some observations may arise upon that custom. It may be thought, there are some inaccuracies in the words of the Statute upon it. The custom, as it is stated to have existed, is thus expressed; that there is due to the widow and to the lawful children of every man being an inhabitant or householder within the said Province of York and dying there or elsewhere intestate, a reasonable *part of his clear moveable goods; unless such child be heir to his father deceased, or were advanced by his father in his life-time; by which advancement it is to be understood, that the father in his life-time bestowed upon his child a competent portion whereon to live. I observe, the statute giving the power of disposing by testament, after reciting the custom, directs, that it shall be lawful for any person inhabiting or residing, or who shall have any goods or chattels within the Province of York, to give, bequeath, and dispose of all their goods, chattels, debts, and other personal estate. One would suppose from this, that the

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SOMERVILLE v. LORD SOMERVILLE. Legislature had some reference to the *lex loci rei sitæ*; and that it was supposed, the custom would attach upon any property locally situated there; though the party was not resident; and though it is now too late to doubt the law upon that, I have some reason to think, our Spiritual Courts inclined, as the Courts of Scotland, to the *lex loci rei sitæ*: and if the question had occurred in that Court, and the authority of the House of Lords had not interfered, that would have been considered as the rule; and for this reason; that their jurisdiction is founded upon it: the distribution arising from the place, where the property is situated; and it is natural for the judge, who acquired his authority from the situation of the property, to suppose, the rule should be that of the place, where the property is. But that now certainly is not the case.

I shall conclude with a few observations upon a question, that might arise; and which I often suggested to the Bar. What would be the case upon two contemporary and equal domicils, if ever there can be such a case: I think such a case can hardly happen: but it is possible to suppose it. A man born, no one knows where, or having had a domicil, that he has completely abandoned, might acquire in the same or different countries two domicils at the same instant, and occupy both under exactly the same circumstances: both country houses, for instance, bought at the same time. It can hardly be said, that, of which he took possession first, is to prevail. Then, suppose he should die at one: shall the death have any effect? I think not, even in that case; and then *ex necessitate* the *lex loci rei sitæ* must prevail; for the country, in which the property is, would not let it go out of that, until they know by what rule it is to be distributed. If it was in this country, they would not give it, until it was proved, that he had a domicil somewhere.

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For these causes I am clearly of opinion, Lord Somerville was a Scotchman upon his birth; and continued so to the end of his days. He never ceased to be so; never having abandoned his Scotch domicil, or established another. The decree therefore must be, that the succession to his personal estate ought to be regulated according to the law of Scotland.

UPTON *v.* LORD FERRERS.†

(5 Vesey, 801—806.)

Implication in a will cannot prevail, unless necessary.

Whether the Journals of the House of Lords, delivered to a Peer, go with the title, *Quære*.

Devise after the death of the devisor's wife: if the devisee is heir, the wife takes for life by implication: otherwise, not.

1801.
Feb. 23.
March 2, 4.
Rolls Court.
ARDEN, M.R.

[801]

In the course of the administration of the assets of the late Lord Ferrers under a bill filed by creditors, a question arose upon the following clause in his will; which being drawn by himself was very inaccurate.

“The lease of my house in London with all my furniture plate and jewels that I may be in possession of when I die and all the residue of my personal estate (except my four opera shares and my furniture in High-Street Mary-le-Bone and those jewels the late Lady Ferrers desired to be given to her grandson Robert Sewallis Shirley for his wife if he married to please his guardians or parents then living) I desire my executors will keep in their possession:”

The testator then made a disposition of the articles so given to his executors and his personal estate, not before disposed of, in favour of his grand-children: but no farther notice was taken of the excepted articles. In a subsequent part of the will he used the words “in my will or my codicil.”

The defendant Lord Tamworth claimed the jewels under the exception in the clause of the will above stated. The Master reported, that the words did not amount to a specific bequest of them to him.

The other point arose upon the claim of Lord Ferrers to the Journals of the House of Lords; which soon after the testator's death were delivered to him, as a purchaser, at a valuation of 50*l.* but he claimed them absolutely as his upon the death of his father; and refused to allow the 50*l.* The Master's report stated that claim.

A third question was upon the rate of interest upon a promissory note, payable on demand. The Master had allowed only 4 per cent.

When the cause came on for farther directions, by agreement

† *Ralph v. Carrick* (1879) 11 Ch. D. 873, 48 L. J. Ch. 801.

UPTON
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[*802]

these points were brought on without any exception to the report. *The MASTER OF THE ROLLS proposed an inquiry as to the jewels : but both parties pressed for the opinion of the Court on an affidavit of the facts, and that a paper in the handwriting of the late Lady Ferrers was found among the papers of the testator, containing the following words :

“ I suppose, you will secure the diamond ear-rings and five pins and my Mocco watch to R. S. Shirley our grandson for his wife so that they cannot be worn by any body else as those that were mine you will do as you please.”

It was said, a reference could not produce any farther evidence. All the debts were paid by a sale of part of the real estate : the personal estate not being sufficient ; and there was some surplus ; out of which the legatees claimed to be re-imbursed.

Mr. Romilly and Mr. Stratford, for the defendant Lord Tamworth :

This is a question, not with creditors, but between specific legatees. There is clearly an implied gift of these jewels. Why does the testator make this exception ? He declares the reason ; and that is equivalent to a declaration, that they shall go to his grandson. *Poulson v. Wellington* ; † *Bibin v. Walker* ; ‡ *Ramsden v. Hassard*.§ Though this will is very inaccurate, the intention is clear.

Mr. Richards and Mr. Stanley, for the other defendants, legatees :

The testator clearly makes a distinction between two sets of jewels. All his jewels he gives with the residue of his personal estate. Then he makes the exception of his opera shares, &c., and in that he only describes the other jewels, as those, which Lady Ferrers desired to be given to their grandson, subject to that condition. He does not give them ; and afterwards he uses the words “ in my will or my codicil ; ” which shews he intended a farther disposition ; and the exception is with a view to that. The opera shares and furniture do not pass ; and the jewels are in the same exception.

† 2 P. Wms. 533.

‡ Amb. 661.

§ 3 Br. C. C. 236.

(THE MASTER OF THE ROLLS : I was at first inclined to think, these jewels passed to Lord Tamworth : but my opinion is a good deal changed upon the other words. If there was a single article *excepted, and this reason given, there would be some argument : but here are other things ; which are clearly not disposed of.)

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Mr. Romilly, in reply :

Even considering those other words, it is clear, the testator intended to give these jewels to Lord Tamworth. He gives no reason for excepting two of three articles ; and he does give the reason for excepting the third. The effect of that reason is not at all weakened by his silence as to the other excepted articles. These jewels were all the jewels he had. That was established before the Master. He had no jewels but what his wife had worn in her life, and which she desired might go to the wife of her grandson. There is an inconsistency of expression : but undoubtedly there is inaccuracy throughout the will. It cannot be argued, that he excepted these articles, in order to reserve to himself a power of making a future disposition of them. He would have had that power equally, if he had given them. * * *

MASTER OF THE ROLLS :

I have considered this point ; which rests upon a clause in a will certainly very inaccurate : and I cannot find any inference from any other part of it, that can throw light upon the point, or afford any argument in support of what is contended by Lord Tamworth as to these jewels, supposed to have been bequeathed to his wife by Lord Ferrers. In the construction *of such a will the Court might indulge itself in a greater latitude than upon a will more accurately drawn. Upon this clause it was insisted, that by necessary inference arising from the manner, in which the testator has used these words, it is equivalent to a gift of them to the purpose, for which the testator has recited Lady Ferrers to have made a request that they should be given. The first inquiry, that was necessary, was, what was the nature of this request, if any ; and to what species of jewels it related ; for

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certainly it did not extend to all jewels in her possession. It is said, no further evidence is to be found upon it; and the parties have desired, that I will permit that to be done, which is not according to the regular practice; that an affidavit of the facts, and an instrument left behind by Lady Ferrers, and represented as the instrument referred to by the testator, may be now read, and taken into consideration, without sending it to the Master; who, it is said could only return this evidence. I am not quite certain, whether the parties are competent to this: but, as it was much pressed, I have no objection by consent of all parties to give my opinion, as if it was before the Court in a regular way. The affidavit, that has been produced, states nothing: nor is there, it is said, any evidence to be found of any declarations of Lord Ferrers, of any engagement or undertaking to his wife, that he would conform to her request. I must therefore suppose, no such evidence can be procured. The affidavit therefore may be laid out of the case; and I must resort to the paper-writing of Lady Ferrers, purporting to be her directions as to her death, and among others containing these words as to her jewels. It is most manifest, that Lord Ferrers in that clause of his will must have referred to this request in this testamentary paper left by his wife; for there is no other, to which it can be referred; and it actually distinguishes the very jewels; and the only question is, whether, coupling that clause in his will with the testamentary paper of Lady Ferrers, it is equivalent to an express declaration upon his part, and a gift of the jewels according to her wish. I wish very much, that I could make such an inference; but whatever might have been my inclination, or whatever reason I might have independent of the will itself, and the circumstances, under which a man may be supposed to act, I never thought myself at liberty to make any inference, that did not necessarily result from all the will taken together; and I should not discharge my duty as a Judge, if in this case I should hold, that there is a necessary inference, that this testator had

[*805] *determined and did mean absolutely to give at that time this portion of Lady Ferrers's jewels in the manner she desired. First, he has not given them in the same manner. Her request is not, that they shall be given to the grandson at all events, but

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upon condition of his marrying with the consent of his guardians or parents. She takes it for granted, that the testator will secure these jewels for the wife of their grandson; for family reasons, I suppose. I cannot do this, without adding what he seems to have added; which shews, the request, to which he refers, was some other or an additional request in some conversations with her. If he had referred to it, as described by his wife, then nothing would have appeared inconsistent with the gift: but here it is qualified and restrained by a particular circumstance. If he had given all the residue of his estate, with the single exception of these jewels, it might have been contended, that they could be excepted for no other purpose than that, for which he states them to be reserved; though I am not quite sure I could then make that inference. But here are certainly other articles of his estate, that he reserved for farther disposition; and what right have I to say, that he did not reserve these also for farther disposition? How can I raise the inference from these words? When the testator has added a term, that his grandson shall marry with the consent of his guardians or parents, I must add that term to the gift itself.

Since I have sat in this Court, many cases have occurred, in which I have been much pressed to raise inferences, that would occur to a common mind: but upon the principles, upon which I have acted, and from which I never will depart, I would not raise them. *Calthorpe v. Gough*,† and a very late case of *Phillips v. Price*, are cases, in which no one could doubt: but it must be remembered, that a Judge in equity is not more at liberty to raise inferences than a court of law. He must not say what he supposes the testator meant, but what the testator has said. Consider, what would be the case in a court of law. Suppose, a testator devised all his estates to his second son, (not the eldest; for then there would be a necessary inference) except a particular estate; which his wife desired he would give to his third son: could a court of law say, that amounted to a disinherison of the eldest son? The question would be, whether, *because he had given all his estate to his second son except one, and mentioned his wife's desire, that he would give that to his third son, there-

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† 3 Br. C. C. 995 n.

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fore he meant to give it to him. If he had given all to the eldest son, with that exception, that would be like the great case,† that everyone has in his mind, of a devise after the death of the devisor's wife to a person, not his heir at law. A private man would say undoubtedly, that he must have intended, his wife should take for her life: but courts of law have always said, they cannot in that case make the inference, that, if the devise after the death of the wife was to the heir at law, they would make. .

Under these circumstances I must hold, that this omission in this will is not necessarily to be supplied. There is only a declaration, that the testator had not brought himself at that time to give away these jewels: but there is not a sufficient ground for me judicially to declare, that he had disposed of them to his grandson by his will.

The point as to the claim of the Journals of the House of Lords was not determined: but the MASTER OF THE ROLLS intimated an opinion, that Lord Ferrers was entitled to them; observing, that a Bishop gives a receipt for the Journals for his See; and upon the death of a Peer the subsequent volumes only are delivered to the next Lord.

KING v. TAYLOR.

(5 Vesey, 806—810.)

1801.
 March 2, 4.
Rolls Court.
 ARDEN, M.R.
 [806]

A clause of survivorship between two legatees, if either of them should die, confined to a case of lapse, and did not prevent the legacies vesting.

ANN REEVES by her will, after directions concerning her funeral, &c., proceeded thus:

“2ndly: I give and bequeath to my dearly beloved son John Charles Reeves when he has attained the age of twenty-three 150*l.* Stock in the 5 per cent. Navy Annuities being a joint stock in the names of Ann Reeves and Thomas Foster and likewise 350*l.* Stock in the 3 per cent. Reduced Annuities in the *afore-said names likewise all my household goods plate and china that

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† 13 Hen. VII. Vaugh. 263, *Gardner v. Sheldon*.

I shall be possessed of at my decease likewise the box of linen and plate which is at Mr. Taylor's, West Smithfield.

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"3rdly, I give and bequeath to my dearly beloved daughter Ann King wife of James King now living at Beverley in Yorkshire all my wearing apparel likewise 50*l*. Stock in the 5 per cents. aforesaid and likewise 350*l*. Stock in the 3 per cent. Reduced Annuities being a joint stock in the names of Ann Reeves and Thomas Foster and I do desire that the 50*l*. in the 5 per cent. and the 350*l*. Stock in the 3 per cent. which I bequeath to my daughter if her husband be living be transferred to my daughter Ann King and to Mr. Joseph Taylor of West Smithfield in the parish of St. Sepulchre's London and to Mr. Thomas Foster of Oxford Arms Passage in the parish of Christ Church Newgate Street London I do nominate and appoint the above Joseph Taylor and Thomas Foster in trust with my daughter for the aforesaid 400*l*. Stock with the interest to be managed for her benefit as they three shall agree to her advantage I give and bequeath whatever interest may be due to me jointly between my aforesaid two children Item I give and bequeath to the above Joseph Taylor and Thomas Foster 1*l*. 1*s*. each for a ring Item I do will and ordain that if either of my children should die the surviving shall have what I have left to the other."

The testatrix then appointed Foster her executor. She died soon after the execution of the will. Ann King survived her; and died on the 9th of March, 1800. The bill was filed by her husband and administrator, claiming the remainder of the 400*l*. stock bequeathed to her; the trustees having in 1795 sold out part, and paid the money to Ann King at the desire of her and the plaintiff.

The defendant John Charles Reeves, as having survived his sister, claimed her share under the will.

Mr. Piggott and Mr. Cox, for the plaintiff:

This legacy was a vested interest in the plaintiff's wife; and upon the whole will the clause of survivorship must be taken to refer to the event of death in the life of the testatrix, in case of a lapse. * * *

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TAYLOR.

Mr. Hart, for the defendant.

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[The cases cited are referred to in the judgment.]

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MASTER OF THE ROLLS:

I am much inclined to think it impossible to raise any judicial doubt upon this case; for repugnancies would arise from the construction of the defendant. This is perfectly distinguishable from all the cases, upon the words "in case of, if it should happen," &c.; for here is a specific time pointed out, at which it appears evidently to be the intention, that the legatee should be put in complete possession of the legacy; which must be expunged, and declared not to operate to any intent whatsoever, and to have been put in for no purpose, upon the defendant's construction. The disposition in favour of these children preceding that clause is without any limitation, or intimation, that they are to be prevented from the full enjoyment of it; or, that if either should die leaving children, that share should not go to them, but to the survivor. Then comes this clause. I do not recollect, whether these precise words "if either of my children should die" have occurred. *Trotter v. Williams*† is in favour of the plaintiff: the other cases, as far as they have gone, are with the defendant. I do not agree with the argument for the defendant in distinguishing this case from *Trotter v. Williams*. It is directly in point; and almost exactly the same as the present. But subsequent cases have occurred; in which words very similar to these have been confined to the death of the party. The first case is *Billings v. Sandom*;‡ upon which there could be no other construction than that put by Lord THURLOW. There was nothing upon the face of the will to restrain it to dying in the life of the testator, to prevent a lapse; which will not be supposed the intention, unless there can be no other.

The next case is *Nowlan v. Nelligan*.§ The words in these cases are not "if he should die," which is a very extraordinary condition to creep into any will, but "in case of his death;" which has more reference to the time than the other expression.

† Pre. Ch. 78.

‡ 1 Br. C. C. 393.

§ 1 Br. C. C. 489.

These cases were much relied upon in *Lord Douglas v. Chalmer*,† the last case upon this subject; which was determined by the LORD *CHANCELLOR; who upon a rehearing adhered to his opinion. His Lordship's reasons certainly do not apply to this case: 1st, What was naturally to be considered the intention: 2ndly, the consequence of the construction contended for would have been to give the absolute interest to Lord Douglas; for there was no qualification, restraining it to the separate use; and the children were evidently the fixed objects of the benevolence of the testatrix. The words in that will did not naturally mean a given time; and the general intention most probably would be better effectuated by the contrary construction than by adding to it, and inferring those words. The LORD CHANCELLOR after considering all the cases continued of the same opinion; shews, how the case of *Lord Bindon v. Lord Suffolk*, 1 P. Wms. 96, applied to a different subject; and says, in *Trotter v. Williams* the construction was inevitable; and it was only providing against a lapse. It was no more so there than in this case. I say the same here. The legacy of the defendant vested at the age of twenty-three; and it would be totally inconsistent to make that an interest for life only, and to expunge what precedes these blind words. The LORD CHANCELLOR then comments upon *Nowlan v. Nelligan*; and concludes, that upon the will before him Lady Douglas took only an interest for life.

This case comes up to *Trotter v. Williams*; and is by no means affected by either the decisions or the reasoning of the other three cases; and the ground of my decision is, that the construction, that these words mean, whenever the death of either shall happen, would be totally inconsistent with the rest of the will. The conclusion is, that there was an absolute interest in the daughter at the death of the testatrix; and in the son at the age of twenty-three; and as to the former it is put into the

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† *Lord Douglas v. Chalmer* (2 Ves. Jun. 501) was "decided upon its own special circumstances, and appears never to be cited except for the purpose of being distinguished," per PAGE WOOD, V.-C., in *Schenk v.*

Agnew, 4 K. & J. at p. 406. It has therefore been omitted from the Revised Reports, but it will be found discussed in the judgment in *Cambridge v. Rous*, in 6 R. R. at p. 203 (8 Ves. at p. 22).—O. A. S.

KING hands of trustees by words, the construction of which must be,
 v. that it is to her separate use.
 TAYLOR.

1801.
 March 9.

Rolls Court.
 ARDEN, M.R.

[818]

GUEST v. HOMFRAY.

(5 Vesey, 818—824.)

Specific performance refused on account of the laches of the plaintiff, the vendor.

A small incumbrance, which may be the subject of compensation, is no objection to a specific performance.

Possession of a house by delivery of the keys.

[*819]

UPON the 31st of January, 1798, the plaintiff entered into an agreement in writing to sell to the defendant an unfinished house in Cardiff in fee for the sum of 800*l.*, payable by instalments. At the execution of the agreement the keys were delivered to the defendant: and he looked over the house. On the 1st of February he went to Bath; where he stayed till April. Then finding that no abstract had been delivered, he called for an abstract; which was delivered upon the 18th of April. Objections were taken to the title upon that abstract: 1st; that no title appeared farther back than 1782: 2ndly; it did not appear, what estates two persons of the name of Richards had: 3rdly; a person, named Priest, stated to have conveyed in 1790, was at that time an infant: *4thly; several married women were stated to have conveyed in 1796; and there ought to have been fines. The defendant took another house in Llandaff; and refusing to perform his agreement with the plaintiff, the bill was filed; praying a specific performance; and charging, that the defendant's reason for refusing to perform the agreement was, that he had taken the other house.

The answer stated the defendant's reason for declining to complete the agreement to be the plaintiff's neglecting to make a title.

In support of the bill it was proved, that upon the 5th of April, 1798, the defendant went to look over the house at Llandaff; and upon the 2nd of April he told the landlord, he should like to become his tenant, provided he could get rid of

Guest's house; and on the 2nd of June he entered into the contract for that house, to take place from Midsummer following.

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The solicitor for the plaintiff by his depositions stated, that soon after the delivery of the abstract the defendant and his solicitor called on the deponent. A conversation upon the objections ensued; and they were informed, the deponent was not then prepared to give a farther abstract on account of the absence of his partner; but it should be furnished. The abstract was taken away by the defendant's solicitor a few days afterwards. Some written observations and queries were some time afterwards delivered to the deponent. The deponent applied for the abstract again, in order to complete it; but did not receive it till August. A fine was levied, as required, at the Autumn Great Sessions. A second abstract was left at the defendant's lodging at Bath upon the 23rd of April, 1799: but the defendant said he would not take it as considering himself bound to have any thing to do with the purchase; and afterwards wrote a letter to that effect. The deponent understood from his conversation with the defendant, when the first abstract was returned, that he would not fulfil the agreement, unless compelled.

The defendant's solicitor by his depositions stated, that he and the defendant went on the 2nd of May, 1798, to the plaintiff's solicitor; * who on receiving the objections in writing said, his partner knew more than he did, of Richards's title; and that no one could suspect it; and that the fines by the married women were unnecessary; as they were tenants in common. The defendant said, he was desirous of completing the purchase on account of the advanced state of the summer, the building being unfinished; and being desirous of proceeding with the building he desired the plaintiff's solicitor particularly to inform him, whether any better title could or would be made by the plaintiff, and what answer could be given to the observations; and the plaintiff's solicitor said, he could give no answer to the observations and queries; but he would take upon him then to say, that no better or other title could be made; upon which the defendant then declared, that, as he could not get a good title, he should

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consider the agreement as at an end ; and he would not lay out his money upon a bad title ; and he and the deponent desired the plaintiff's solicitor to take that notice ; and that the defendant considered the contract as at an end from that day ; and the plaintiff's solicitor said "very well." The deponent received a note the end of May or beginning of June ; stating, that the plaintiff being returned, and wishing to conclude the contract, the deponent was required to attend with the abstract ; that the objections, if any, might be answered. Soon afterwards the deponent wrote an answer, that the abstract was gone to Llandaff with other papers ; that the plaintiff's solicitor had had objections ; but, if he had mislaid them, they might be had again, as soon as the defendant returned ; not meaning to revive the contract, but only to satisfy the plaintiff's solicitor, that the objections were well founded. Upon the 18th of August the deponent was informed by the defendant, that the plaintiff's solicitor had applied to him for the abstract ; (which had been sent with the defendant's other papers to Llandaff.) The deponent delivered the abstract that evening without any observations or queries thereon to the best of his recollection and belief ; at the same time observing, that the abstract being taken with other papers upon the defendant's removal to Llandaff, and no answers having been given or notice taken since the 2nd of May, and notice being then given by the defendant, that he considered the contract at an end, the deponent considered the abstract of no consequence ; and requested the plaintiff's solicitor to take that notice, that receiving the abstract at *that time must not be taken as intended to revive the agreement ; considering it at an end from the 2nd of May, the time of giving the notice. No queries or observations were made upon that abstract at that or any other time to the best of the deponent's belief, &c., either by him or the defendant except upon the 2nd of May. The deponent never heard any thing more on the subject till the 10th of April, 1799 ; when another abstract was delivered at his office with answers to the observations ; which he returned the same day without any message.

The defendant also relied on the circumstance of having given up a contract he had entered into with Mr. Kay for some lease-

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hold premises, to be held with the house: but the plaintiff proved by the evidence of Kay, that the defendant might have them again, subject only to the remainder of a term for three years as to part; of which a year and a half were expired: upon which the MASTER OF THE ROLLS was of opinion, there was nothing in that objection.

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Mr. Lloyd and Mr. Lewis, for the plaintiff:

The material date is the 2nd of May, 1798: at which time the defendant insists on being released from the agreement; the objections to the title not being obviated at that time. That is a mere pretence. The fact is, he had taken another house; and wished to get rid of this. If there is a good title at the time of the decree, it is sufficient: *Langford v. Pitt*.† The evidence for the defendant cannot be true: no professional man could have given such a reason as is there represented, that fines were not necessary.

Mr. Romilly and Mr. Whishaw, for the defendant:

* * In common cases the only inconvenience of the delay is as to the money; but here the Court cannot put the parties in the same situation. Is it possible to say, this plaintiff has not been guilty of the grossest laches? It was incumbent upon him to tender the abstract. It is true, no particular time was limited for the completion of the purchase: but all the circumstances shew, it was to be as soon as could reasonably be done. The objections were well founded; and are not even now obviated. Suppose, the defendant had reason for wishing to get rid of the contract: that cannot affect the case; the plaintiff must rely on his own activity and diligence; and his conduct amounts to a complete abandonment, depriving him of all title to relief. [They cited several cases to shew that the vendor's laches would discharge the purchaser.]

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Mr. Lloyd, in reply. * * *

MASTER OF THE ROLLS:

No one can doubt the motives of the parties in this cause.

† 2 P. Wms. 629.

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The only question is, whether the plaintiff has done enough to shew, he took all the pains he could to be ready to carry into execution the agreement ; which, it is perfectly clear, the defendant meant to get rid of, if he could. The plaintiff does not seem to me to have done all he ought to have done. It rests *entirely upon that point, without balancing the evidence of the two solicitors ; which it is not very easy to reconcile. By the contract immediate possession was to be given ; and was given without doubt ; though the defendant says in his answer, he never took possession ; but the keys being in his possession, it must be considered, that he was in possession. Without doubt by the delivery of the keys the possession was ready for him ; and indeed he had it. I do not like his answer in that respect. Having the keys in his possession, that is possession, if he chose to take it. Neither the defendant demanded, nor the plaintiff tendered, the abstract immediately. I do not agree, that it is solely incumbent upon the vendor to move by making a tender of the abstract. Something is also incumbent upon the purchaser, to ask for it. But neither the one asked for, nor the other tendered, it. Then what happened ? Before the 5th of April the defendant had determined to get rid of the bargain, if he could ; and was looking out for another house. I do not know what his reasons were : but he had no right to make use of those reasons, whatever they were, in order to make improper objections, or to expect any thing unreasonable from the vendor. Finding, he could make a bargain for a house at Llandaff, he throws up the negociation with Mr. Kay for the other premises, to be held with this house ; and then without doubt he asked for the abstract with a view to make objections to the title. Objections were made ; and I think, it is fairly put in issue by the answer, that the defendant had stated, that the contract was at an end. I think, that called upon the plaintiff's solicitor to state, that the conversation was not so. The plaintiff's own attorney does not deny, that he saw the defendant meant to abandon the purchase, if he could. That should have made them more ready to cure the objections ; and I should have expected the most decisive evidence from the plaintiff's solicitor, that he never had an intention not to give another abstract ; and he should have apprised

the defendant of that. There is no evidence, that, even when the abstract was sent back, he said, the defendant was to be still bound, and was not released; and desired him to take notice of that. There is nothing to shew, that he was proceeding with due diligence; and meant to proceed with the contract; nor that he was even holding the purchaser to it. It is clear therefore, the plaintiff was called upon to be more quick than he has been; and has not done all he ought. It happened, that he met with an unwilling purchaser. I think, he has not *entitled himself to a specific performance: but I do not at all like the defendant's answer; for he pretends, he wished to go on with the purchase. It would have been better for him to have said, he did not wish to go on with it; and therefore wished to come to a determination upon it; that the objections were fair objections; and he thought himself entitled to take them. If he had done that, I should have dismissed the bill with costs. On the other hand, they should have cautioned him; and have told him, they were going on to make out the title; and that they were in hopes of doing it. If they had done all that, and shewn a probable ground to him, that they might make a good title, I should perhaps not have thought a year too long.

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Upon the whole the bill must be dismissed; but, under the circumstances, without costs.

EMERY v. WASE.

(5 Vesey, 846—849.)

THE report of this case on Appeal (8 Vesey, 505—519) will be contained in volume 7 of the "Revised Reports."

1795.

May 5, 7.

1801.

March 24.

Rolls Court.

ARDEN, M.R.

[849]

KEMP v. KEMP.†

(5 Vesey, 849—862.)

Under a power to appoint among several objects each must have a share, and, by the rule in equity as to illusory appointments, a substantial share, unless a good reason appears; as, another provision by the person executing the power, not from any other quarter. Under such a power an appointment of a fund, nearly 1,900*l.*, among three children, the objects, 10*l.* to one, 50*l.* to another, and the remainder to the third, all having other provisions *aliunde*, was set aside as illusory.

Power to appoint to the use of such child or children, &c.: an appointment to one or more good.

A power to appoint among several objects well executed at law by giving each a share, however small.

MARTHA SCATTERGOOD by her will, dated the 29th of August, 1758, after giving several specific and pecuniary legacies, among others, to Isaac Kemp 20*l.*, to his son Anthony Facer Kemp a watch, and to his daughter Martha Seacombe a diamond ring, disposed of the residue thus:

“What remains after paying these legacies I give to my cousin Martha Kemp for her life and then to be disposed of amongst her children as she shall think proper.”

Martha Kemp, the wife of Isaac Kemp, and her son Anthony Facer Kemp were appointed executors.

After the death of the testatrix a bill was filed by Anthony Facer Kemp; under which several orders were made, and the residue was paid into the bank. Isaac Kemp died in 1775; and by his will, dated the 14th of February, 1767, among other things giving a legacy of 50*l.* to Anthony Facer Kemp, reciting, that he had a few days before given him his fortune, or such sum as he thought a fair, competent, proportion, he gave to his daughter Martha *Seacombe a legacy of 100*l.*, and to his son Samuel Scattergood Kemp 500*l.*; and appointed his wife executrix.

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† *McGibbon v. Abbott* (1885) 10 App. Ca. 653, 660; 54 L. J. P. C. 39. The equitable rule as to illusory appointments was rendered inapplicable to appointments made after the 16th July, 1830, by 11 Geo. IV. & 1 Wm. IV. c. 46, and is therefore now of little practical importance. This

leading case of *Kemp v. Kemp*, is however retained to explain the previous state of the law and thus to show the operation of the Act. Subsequent cases on this point will be omitted from the “Revised Reports” as obsolete unless there is any special reason for preserving them.—O. A. S.

Martha Kemp by her will, dated the 30th of August, 1785, as to, for and concerning, all such goods, chattels, estate and effects, as she was entitled to for her life under the will of Martha Scattergood, and which she was thereby empowered to dispose of after her decease to and amongst her children in such shares and proportions as she should think proper, gave and disposed thereof in the words following :

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“ I give, bequeath and dispose, unto my son Anthony Facer Kemp the sum of 50*l.* part thereof. I give, bequeath and dispose, unto my daughter Martha Seacombe, the wife of Richard Seacombe, the sum of 10*l.*, other part thereof, to and for her own sole and separate use and benefit absolutely ; and as to all the rest, residue and remainder, of such goods, chattels, estate and effects, of what nature or kind soever, I give, bequeath and dispose of, the same and every part and parcel thereof unto my son Samuel Scattergood Kemp to and for his own use and benefit for ever.”

She then appointed Samuel Scattergood Kemp sole executor ; and died in 1794 ; leaving only the three children mentioned in her will.

The fund, which was the subject of appointment, arising from the residue of Martha Scattergood’s personal estate, amounted to nearly 1,900*l.* This bill was filed by Samuel Scattergood Kemp, claiming under the appointment of his mother.

The defendant Anthony Facer Kemp by his answer admitted, that at different times he received from his father 1,901*l.* 14*s.* 7*d.* but denied, that he received the whole as an advancement in the world ; claiming an allowance, beyond what he had received, as a compensation for fifteen years’ service, and also for two legacies of 100*l.* each received by his father in his right. He stated a comparison of his circumstances with those of the plaintiff. He admitted, that Martha Kemp lived with the plaintiff till her death ; but denied, that she was maintained by him ; believing, he received dividends accruing to her ; and stating, that the plaintiff *also claimed several thousand pounds under her will, insisted that the appointment was illusory.

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The defendants Seacombe and his wife by their answer stated, that upon their marriage in 1758 he received from Isaac

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Kemp 400*l.* in part of 1,000*l.* her portion ; and he received the remainder in 1779 under a decree, with interest, and also a gift from another person to his wife of 100*l.* ; received with interest under the decree. He also received a legacy of 100*l.* ; given to her by her father's will. He stated, that the plaintiff's circumstances were much superior to his ; and that he had sixteen children ; and he believed, the plaintiff had received several sums from his father, besides being settled in business by him and the legacy of 500*l.*

Evidence was produced to shew the other provisions made for the children. Evidence was also produced to shew, that the instrument was obtained by undue influence and ill-usage ; which was proved by the plaintiff's clerks and servants ; and opposed on his part by two witnesses ; who had attended the family as apothecaries : but the MASTER OF THE ROLLS early in the argument declared, that as the instrument was proved as the will, he should pay no attention to that evidence.

Mr. Graham, and *Mr. Short*, for the plaintiff. * * *

Mr. Lloyd, and *Mr. Fonblanque* for the defendants. * * *

Mr. Graham in reply.

[The cases cited by counsel are referred to in the judgment.]

MASTER OF THE ROLLS :

[855] The only point for my opinion is, that according to this power Martha Kemp was bound to give something more than a shadow to all her children ; and that 10*l.* is not in itself, independent of circumstances, illusory ; or, if it is, that taking all the circumstances together, it cannot be held to be so. In the old cases they used to go into the point, how the children behaved : but they do not now ; and I will not.

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THE MASTER OF THE ROLLS :

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This cause has been before me longer, I believe, than any other ; and certainly should not have remained so long for judgment, if I had not entertained doubts, which I must always entertain upon questions of this sort, as to the decree I am to make.

Another reason is, that I hoped, what I recommended, that the parties should come to some agreement, would have taken place. That is extremely desirable; for nothing is more disagreeable to a Judge than to make the decision I find myself under the necessity of making.

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This cause arises upon what has frequently been a question in this Court: the due execution of trusts and powers; which are in this Court considered as trusts. The question is, whether under the circumstances of this case this appointment can stand; for special circumstances were relied on, and a great deal of evidence produced to shew, what provisions these children took from their father and others: but I do not think that material now; for it affords no ground to entitle the person executing the power to take away from them what upon the construction of the power they might be entitled to: that is, a real substantial share of this fund. The property is pretty nearly 1,900*l.* I should hardly have conceived, that 50*l.* could be considered a substantial part: but the sum of 10*l.* to the daughter was evidently meant to be no gift: the mother merely supposing herself to be under the necessity of giving something to each. The first point is as to the construction of the power. One of the counsel for the plaintiff was much disposed to admit, that this must be construed to be a power under such circumstances as called upon her to give some share to each: the other counsel insisted, and I think, so far rightly, as being the most material point, that according to the true construction of this power, notwithstanding the very rigorous manner in which these powers have been construed in this Court, it was an absolute power of disposition; and she might have given the whole to Samuel Kemp. The question is, what is the real construction of these words: "then to be disposed of amongst her children as she shall think proper:" whether according to the true construction of this, which must be admitted to be a trust, so that she could only give it to a child, she might give it to one only, and that would have fulfilled the intention. I was for some time disposed to think, such a construction might be put upon it. The *case relied on was *Burrell v. Burrell*,† decided by Lord CAMDEN, a very great Judge:

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† Ambler, 660.

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but when that case comes to be considered, there are many essential differences. The question then is, whether according to the true construction in law and equity upon a trust to dispose among a certain, given, assigned, number of particular persons each of those persons is not to be considered as entitled under that; and after looking through every case that was cited, I am forced to declare, I find it to be the opinion of a series of Judges from Lord NOTTINGHAM to the present time, that words like these amount to a gift to all the objects; and the exclusion of one is an undue execution. If the words were "to such of her children as she shall think proper," that would give a latitude to appoint to one only.

All the questions, that can arise upon these words, seem to have been considered in the case of *Swift v. Gregson*† and the case of *Spring v. Biles* in the note; from which may be collected the construction, which courts of law put upon powers of this nature. The words in the former of those cases were "to and for the use and behoof of such child and children of the said John Gregson," as John Gregson should at any time by deed or will, &c. limit, direct or appoint. The question was, whether such words gave a power to appoint to any one in exclusion of the others. The words in *Spring v. Biles* were "to and amongst such of my relations as shall be living at the time of my decease in such parts, shares, and proportions, as my said wife shall think proper." The Judges were of opinion, that these words gave full power to give to one or more; and most of the cases, that have arisen upon words of this sort, are there quoted; as *Thomas v. Thomas*;‡ where the words were "to one or more of his children;" *Tomlinson v. Dighton*,§ where it was "to any of his children;" *Macey v. Shurmer*,|| "amongst all or such of his children;" and *Liefe v. Saltingstone*,¶ "to such of my children." All these words were held, and very properly, to shew a manifest intention to give a power to appoint to any one child, that should answer the description. But it does not appear to have been argued, at least not conceded, that the word "amongst" has not

† 1 Term Rep. 432.

‡ 2 Vern. 513.

§ 1 P. Wms. 149.

|| 1 Atk. 389.

¶ 1 Mod. 189; 2 Lev. 104; Carter, 232.

been considered equivalent to "all and every;" which words are mandatory; and make it *necessary, that each should have a share. It seems to me, that upon the case now before the Court the Judges would have had no doubt, that every one must have taken a share.

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I will now state the cases, that have occurred upon this subject, chronologically; and see how far the opinions upon this question of illusory appointment, and I lament extremely, that it has ever found its way into this Court, have been carried. The case, that settled this, is *Gibson v. Kinven*,† determined by that great Judge Lord NOTTINGHAM, stiled the Father of Equity. It was contended in that case, that any one might have been excluded. It is said in the Report to have been the opinion of Chief Justice PEMBERTON, then at the bar, that a ring might have been given to one; and so it might, if this would be good: but the appointment was set aside by Lord NOTTINGHAM for inequality. How can the words in that case be distinguished from "amongst her children?" Lord NOTTINGHAM was of opinion, it was necessary to give some part to each; and a nominal part would not satisfy the object of the power.

That case was followed by *Wall v. Thurborne*, reported in two places in Vernon: ‡ but that book is unfortunately so inaccurate, that I do not know upon which statement to rely. If I take the first statement, it is very near this case.

Two other cases are quoted there, by whom determined I do not know: *Cragrave v. Perrost*, and *Swetnam v. Woolaston*. Upon the first I rather think the Court would have paused, before they would have set that aside, but for the peculiar circumstances. But *Swetnam v. Woolaston*, if it is to have any authority, would be against the decision in *Gibson v. Kinven*. It is a decision departed from in the principal case, and by whom determined I do not know. Therefore it is not entitled to be considered as of any authority.

Clarke v. Turner§ was, I believe, determined by Lord SOMERS. Whether, or not, the Court was struck with the extent of the word "relations" and the subject being land, they took upon themselves, to execute the trust; and decreed it to the heir at law.

† 1 Vern. 66.

‡ 1 Vern. 355, 414.

§ 2 Freem. 198.

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The next case is a very extraordinary one: *Warburton v. Warburton* : † a power to two of the testator's daughters, whom he appointed his executors, to dispose to the use of themselves, their brothers and sister, or to such of them and in such proportions as they should judge fit and convenient according to their needs and necessities. There the Lord Keeper WRIGHT and the House of Lords seem to have thought that the trust devolved upon the Court. The reason is a very odd one. I hope, they did not lay much stress upon his being bred to the law. It is hardly to be collected, what construction they put upon it. It seems, as if they exercised the power themselves: a power, which of late the Court has disclaimed; and I hope, that will always be followed. If the power is not executed properly, the rule now is to set aside the execution and give the fund equally. But I suppose, the construction there was, that it was a general trust, to be exercised for their own benefit; and therefore the Court was very jealous; and completely controlled it.

The next cases are *Thomas v. Thomas*‡ referred to in *Swift v. Gregson*, and *Astry v. Astry*.§ The former could admit no doubt; and it was determined, that the fund might be given to one: the power being to give to one or more, there was no room for the Court to interfere. In *Astry v. Astry* the power was to divide among his three daughters in such proportions as the wife should think fit; and the Court was of opinion, it must be equally; unless a good reason appeared. That I take not to be the rule of the Court now. However, it is perfectly clear, that under words of this sort, if some very good reason does not appear, which I admit might be given in the particular case, for giving a very small sum to one, such a disposition cannot be allowed.

Then we come to some cases more modern; and upon which the rule is settled, as it now stands. In *Menzey v. Walker*,|| notwithstanding the reason given, viz. the provision from the grandfather, yet Lord TALBOT thought, under the words in that case, every one must have a share, and not an illusory share. The next case is *Maddison v. Andrew*.¶ The principal point does

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† 1 Br. P. C. 34.
 || For. 72.

‡ 2 Vern. 513.

§ Pr. Ch. 256.

¶ 1 Ves. sen. 57.

objects living were entitled to a share; and that no discretion in such a case devolved upon the Court. Then in *Coleman v. Seymour*† it was held, that a share must be given to each; and that a share not illusory. The next is a case very often quoted, *Alexander v. Alexander*;‡ which seems almost to decide upon such words as these. Under a power to appoint unto and among such children begotten between them and in such proportion as she shall direct, &c. Sir THOMAS CLARKE held, that each must have some share; and that must not be a nominal share.

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The last case I shall take notice of is that, which has been so much commented upon, *Burrell v. Burrell*.§ The testator gave all his real and personal estate to his wife, to the end she might give his children such fortunes as she should think proper, or they best deserve; to whom he charged his sons and daughters to be dutiful and obedient, and loving and affectionate to each other. The son had an estate of 400*l.* a-year. The wife gave two daughters 200*l.* each; to the son a guinea; and the remainder to two other daughters. It is impossible to suppose, that Lord CAMDEN laid any stress upon the guinea. I cannot conceive, that he considered that as any thing; for it is now too well settled, and it is imposed on every Judge as an obligation, whatever may be the inclination of his own opinion, that, though a gift of any part is a good execution at law, yet in equity, unless it is substantial and real, it is the same as no execution. The words of the report leave it a little doubtful. It states two reasons; and concludes, that, Lord CAMDEN being of the same opinion, the bill was dismissed. Lord CAMDEN as I conceive, was of opinion, that these words were so ample, that if she thought fit to give nothing to one, she might so execute her power. I will not say what my own opinion would have been. I am willing to subscribe to that of Lord CAMDEN upon such a doubtful question; being perfectly satisfied, that in setting aside these appointments, criticising upon the words "to and amongst," &c. and the rule as to illusory shares, the Court goes against the intention. I must therefore think, that under the words of that will Lord CAMDEN thought, the wife might have given the whole to one child; and had a right to exclude any, who in her opinion

† 1 Ves. sen. 209.

‡ 2 Ves. sen. 640.

§ Amb. 660.

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did not want it. Then ought that to have any effect upon these words? I think not.

My inclination is strong to support the execution of this power, if I could consistently with the rules I find established. Finding those rules established, I must consider these words with reference to those rules. This is a trust beyond all question. What is the effect of the words "amongst her children?" Is it necessary to say "all and every?" *Alexander v. Alexander* and the cases quoted in *Swift v. Gregson* plainly shew that, if it was not for the word "such" the word "amongst" would require a distribution, so that every one must take some share. A court of law says, a share, however little, will be sufficient. The power must be executed according to the words: if not, it will be bad at law. I shall mention *Pocklington v. Bayne*, in order to shew that Lord THURLOW's opinion was the same. His Lordship held an acre given to two for their lives was illusory; evidently adopting the rule; which is too firmly established for a Judge to extricate himself from it. I wish to consider these cases as going upon the ground of fraud. I do not notice the late cases; principally because most of them were determined by me: but all of them, *Bristow v. Warde*,† *Wilson v. Piggott*,‡ and *Vanderzee v. Aclom*,§ are upon the same principle.

I am sorry, I have taken so much time upon this cause: but it proceeded from an earnest wish, that the parties would compromise it. My conclusion upon it is, that, notwithstanding the large words, every child must have a share; and the mother was bound to dispose of the fund so as to give every one a share. She has done so: but the share given to her daughter, for which no reason appears, sufficient to justify the mother as a trustee, is not sufficient. All the provisions from others will not do to exclude her from this fund; for Mrs. Scattergood has said, each shall have a share. If the person, not the person creating the power, but the person having the execution of it, has provided for them in some other way, that is sufficient; according to the LORD CHANCELLOR's opinion; of which I shall always be glad to

† 2 R. R. 235 (2 Ves. J. 336).

§ 4 Ves. 771.

‡ 2 R. R. 246 (2 Ves. J. 351).

avail myself. But in this case I am under the necessity of adhering to the rule, established by such Judges, that it would be a presumption to attempt to get out of it; and under that obligation I must decide, that Martha Kemp was bound to dispose of this property, and to give a substantial share to each child; and that the words are not large enough to enable her to give only to one. Though I had *some doubt as to that, I am satisfied now, I cannot make that construction; and am bound to give it among all. I am also bound to say, the bequest of 10*l*. was clearly meant as an illusion and not an execution. Therefore the execution is void. It is in vain now to lament, as I have in many other cases, that this Court did not follow the rule of law: but now this is so settled, that no Judge will, and certainly I will not, presume to go against it. The Court must decide, whether the share is substantial or not.

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For these reasons, but with less satisfaction than I have had in any other judgment I have given, being satisfied, the party creating the power meant a much larger power than I can hold the person executing it had, I must declare this appointment void.

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(5 Vesey, 862—879.)

A son, tenant in tail in remainder, when just of age, in 1769, joined his father, tenant for life, in a recovery, for the purpose of raising 3,000*l*. for the father, and re-settling the estate; the son taking back only an estate for life, with remainder to his first and other sons, &c. Whatever equity he might have had against that settlement was lost by his marriage and acquiescence till after the death of his father in 1793; though under the circumstances there was no probability of issue. Upon that ground a bill by trustees under a general trust for his creditors, claiming as purchasers under the statute 27 Eliz. c. 4, was dismissed; without deciding, whether they could sustain that character; or, how far a settlement, merely as being voluntary, is affected by the statutes of Elizabeth.

1800.
Dec. 1, 11.

1801.
March 24.

Rolls Court.
ARDEN, M.R.

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By indentures of lease and release, dated the 16th and 17th of February, 1746, Abraham Gapper, Serjeant at law, conveyed all his estates in the counties of Wilts and Somerset to trustees and their heirs; as to the Wiltshire estates, to the use of himself for

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life without impeachment of waste; remainder to the use of Mary, his wife, for life; remainder to the use and intent, that the trustees should pay certain annuities to their daughters for their respective lives; and as to the Wiltshire estates, subject to such annuities, to the use of Henry Gapper, the eldest son of Serjeant Gapper and Mary his wife, for life without impeachment of waste; remainder to the trustees, to preserve contingent remainders; remainder to the use of his first and other sons successively in tail male; remainder to the use of Robert Gapper, the second son of Serjeant Gapper, for life, and to his first and other sons in the same manner, with similar remainders to Richard the third son, and his first and other sons; remainder to the daughters of Serjeant Gapper, as tenants in common in tail general, with the ultimate limitation to Serjeant Gapper in fee.

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The uses of the Somersetshire estates were declared, as to one fourth, to Serjeant Gapper in fee; and as to the other three *fourths to his three sons respectively in tail male; with cross-remainders; and the ultimate limitation to Serjeant Gapper in fee.

The settlement contained powers of jointuring and leasing to the three sons when in possession; and a power to Serjeant Gapper to revoke the uses.

Serjeant Gapper died in 1753. His widow died in 1762. Henry Gapper died in 1767, without leaving any issue; and all the daughters of Serjeant Gapper also died without issue.

Robert Gapper by his marriage in 1754, with Honora Sneyd had issue two sons, William Gapper and James Webb Gapper. The eldest son William Gapper having attained the age of twenty-one on the 15th of December, 1768, upon the application of his father, who was then in distressed circumstances, consented to join in suffering a recovery to bar the intail, and to limit the estates for a term of years in trust to raise any sum not exceeding 3,000*l.* for Robert Gapper, and to answer his then occasions. Accordingly by indentures of lease and release, dated the 20th and 21st of January, 1769, and a recovery suffered in pursuance thereof, all the estates in Wiltshire and Somersetshire, wherein they or either of them were seised of any estate of freehold or in-

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heritance, were conveyed to Thomas Carter and his heirs, to the use of trustees for the term of two thousand years, upon trust by sale or mortgage to raise any sum not exceeding 3,000*l.*, and pay the same to Robert Gapper; and after the expiration or other sooner determination of the said term, and in the mean time subject thereto and to the trusts thereof, to the use of Robert Gapper and his assigns for his life without impeachment of waste; remainder to the use of William Gapper and his assigns for his life without impeachment of waste, remainder to the use of Thomas Carter and his heirs during the life of William Gapper, in trust to preserve the contingent uses; remainder to the use of the first and other sons of William Gapper successively in tail male; with similar remainders to James Webb Gapper for life, and to his first and other sons in tail male; remainder to the use of Robert Gapper, the father, his heirs and assigns for ever.

This settlement contained a power to the son, when in possession, to jointure and provide portions, and also powers to the *father to jointure a future wife; and to settle the mansion-house, but subject to waste, upon his present wife.

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In July, 1769, the sum of 3,000*l.* was raised by mortgage under the term; which sum was wholly paid to Robert Gapper, the father, or applied to answer his then occasions.

By indentures of lease and release dated the 13th and 14th of December, 1776, reciting the indentures of January, 1769, and the mortgage, and that William Miller, the mortgagee, had lent Robert Gapper a farther sum over and above the 3,000*l.*, and that there was then due to Miller 3,840*l.* and that Dagge More had agreed with Robert Gapper for the purchase of his estate for life and the ultimate reversion or remainder in fee of and in the said estates comprised in the said several indentures, Robert Gapper in consideration of the sum of 100*l.* and an annuity of 70*l.* a-year during his life conveyed the Wiltshire and Somersetshire estates to More, his heirs and assigns, as to a capital messuage, called Balaam House and other premises, part of the Somersetshire estates, to the use of Robert Gapper for ninety-nine years, if he should so long live, and as to all other the Somersetshire estates to the intent that Robert Gapper should

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receive the said annuity of 70*l.* a-year, with powers of entry and distress for securing the same ; and as to the premises comprised in the term of ninety-nine years, from the determination thereof and subject thereto, and as to all other the premises thereby conveyed, to the use of More, his heirs and assigns for ever, subject to the annuities under the settlement of 1746, the term of two thousand years, the mortgage, an annuity granted by Robert Gapper during his life, and to the subsisting leases.

In February, 1783, William Gapper, in consideration of 100*l.* then paid and 100*l.* to be paid by him within twelve months after the decease of Robert Gapper, purchased More's interest in the estate for life of Robert Gapper and the reversion in fee.

In 1783 James Webb Gapper died without leaving issue. In 1793 Robert Gapper the father died. William Gapper married in 1779 ; but he had no issue ; and about fifteen years before the bill was filed he was separated from his wife ; a deed of separation [*865] *having been executed. His wife during the greater part of that period has resided in America ; where she possesses considerable estates.

By indentures of lease and release, dated the 12th and 13th of July, 1799, reciting, that William Gapper was indebted to the several persons in the several sums set opposite to their names in the schedule thereto, and that being desirous to discharge all his said debts he had proposed at a meeting, which he gave notice to all his creditors to attend, to vest his Wiltshire estates, which were valued at more than the amount of all the debts comprised in the schedule, in trustees for that purpose ; and also reciting, that he was possessed of the Wiltshire estates, subject to a mortgage of 3,000*l.*, for his life, with remainders to trustees to preserve contingent remainders ; remainder to his first and other sons in tail male ; remainder to himself in fee ; and that he had no issue male, and had been upwards of fifteen years separated from his wife ; who had during the greater part of that time resided in America ; where she was possessed of considerable estates, that were settled upon her for her separate use, and that a deed of separation had been executed by him and his wife, he for more effectually securing to his several creditors the payment of their debts set opposite their respective names in the

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schedule conveyed the Wiltshire estates to Thomas Brown and other creditors, their heirs and assigns; upon trust with all convenient speed to sell, and pay the mortgage debts of 3,000*l.* and 100*l.* and all his other debts, that should be proved due to the persons mentioned in the schedule; and to pay the residue of the purchase-money, if any, to William Gapper, his executors, &c. It was provided, that in case any doubt or difficulty should be made respecting the title of William Gapper to sell the fee-simple and inheritance, the trustees should institute any suit, or make application to Parliament to authorise and compel the then trustees or trustee to preserve contingent remainders during the life of William Gapper and all other proper parties to join in the sale and conveyance.

The bill was filed by the trustees under that conveyance on behalf of themselves and all other the creditors of William Gapper against Carter, the trustee under the settlement of January, 1769, and William Gapper, Dagge More, and the assignees of the mortgage for 3,000*l.*; and the prayer of the bill was, that the plaintiffs *may be enabled to carry the trusts into execution; and for that purpose that all the defendants may be decreed to join in a sale and conveyance.

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It did not appear, that any settlement was made upon the marriage of William Gapper; and it was said, that all the property of his wife's, which was considerable, was upon the separation settled to her separate use.

The MASTER OF THE ROLLS directed the counsel for the trustee to support the interest of the children of William Gapper; supposing he should have any; observing, that the Court could not take into consideration, that in all probability there will be no children; and though there could be little doubt, that this settlement would have been set aside, if the son had come soon, it would be difficult at this distance of time; the son having married; and the wife supposing him tenant for life, with remainders to her first and other sons in tail male.

Mr. Richards and *Mr. Plowden*, for the plaintiffs:

The object of this bill is to set aside this settlement of 1769,

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operating to the prejudice of the son and of creditors. It is a hard settlement with respect to the son, and certainly a voluntary settlement; and which under the circumstances ought not to have been made. The trustees are purchasers for valuable consideration. Besides that, it is impossible not to see, that improper advantage was taken by the father. * * *

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Mr. Heald, for the defendant Carter, the trustee :

This deed of 1769 stands upon, not only good and meritorious, but valuable consideration. The objections are, that the son parted with an estate tail; taking back only an estate for life; and that the father took the ultimate remainder in fee, and the sum of 3,000*l*. With respect to the former objection, the reduction of the estate tail of the son to an estate for life has always received the favour and encouragement of this Court: *Winnington v. Foley*.† The reason there stated is, that it is the means of preserving the estate longer in the family. This was confirmed in *Mansell v. Mansell*.; * * *

Mr. Richards in reply.

1801.
March 24.

THE MASTER OF THE ROLLS :

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This is a very curious case: but the ground, upon which I shall decide it, will not make it necessary for me to enter into all the learning, that was displayed in the argument. It was extremely well argued on both sides. I mean to say, I feel myself extremely obliged to *Mr. Heald*; who undertook the task at my desire and earnest recommendation. He was set up here to defend the rights of persons, who might possibly come *in esse*. Feeling it his duty, standing for the trustee, to contend as if those persons were real parties before the Court, he has certainly done them ample justice; and I believe, I have every information I could receive; and the cause could not have been better argued; but the decree will be made upon a much narrower ground; and it will not be necessary to enter into the consideration of the statutes 13th and 27th Elizabeth.

The bill is brought to set aside a settlement executed under an

† 1 P. Wms. 536.

† 2 P. Wms. 678; see page 683.

agreement between a father and a son in 1769. This transaction then took place. Robert Gapper, the father, was then seised for life ; with remainder to his first and other sons in tail male, and the reversion in fee in himself as heir of his father. Under these circumstances, William Gapper, the eldest son, was prevailed on, as it is said, improperly, and perhaps so, very soon after he came of age to reduce himself to be tenant for life, and to raise 3,000*l.* for the benefit of his father ; as it appears. It is said, this standing *by itself was such an exercise of parental authority as this Court will not endure ; that a son shall assist his father with such a sum, and without any cause or consideration reduce himself to be tenant for life. I am not clear, that, stating it in that way, if a complaint had been made immediately to the Court, and the father was alive to state the real transaction, the Court would not relieve : but I do not choose to give an opinion even upon that. The consequence was, a recovery was suffered ; and the effect was that I have stated. But there has intervened a material transaction ; which upon the argument and the cases quoted has put an end to the equity of the son to set this aside at this distance of time and under these circumstances. The son acquiesces under this settlement ; and marries. It is said, there was no settlement upon his marriage ; and there is no evidence, that this entered into the consideration of the lady. She is still living : but it is said, there is no probability of children. They live at a distance from each other ; having been long separated. It is however admitted, I cannot act upon that ; but must suppose a possibility of children. The law cannot be altered by my opinion as to the probability of that event. The question then is, whether the children, supposing, there may be children, have a right to be protected against the right of the son to set this aside. The father died in 1798. No attempt had been made to that time to affect the settlement either at law or in equity. But after that time, after the father's death, I will suppose very soon afterwards, this bill is filed ; praying the Court to interfere, and compel the trustee to preserve the contingent remainders, for he is the only person I can act upon, to convey to the uses of the deed, by which William Gapper becoming extremely encumbered conveyed to trustees,

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upon trust to sell for the payment of his creditors in general ; for it is not a particular purchase for valuable consideration ; except as such a deed for the payment of creditors generally can be so considered. But this is in a court of equity. They do not insist, that all this is void at law. I will give them liberty to make out at law, that this deed was fraudulent and void under the statute. But they come here upon a mixed case ; that it is either absolutely void under the statute, or a stretch of parental authority, which this Court will not suffer to operate against the son. Suppose the bill brought upon the latter ground ; that must ever be without affecting the rights of others ; for if the son has done any act, by which others acquire rights *upon the supposition, that his right is according to the deed, it is not competent to him to come upon circumstances, not arising out of it, to set it aside.

Another rule affecting this case is, that the application should be made in such time, that the transaction can be known and sifted to the bottom. It is said, the decision in *Kinchant v. Kinchant* † did not meet the approbation of a noble lord ; and I confess, I think, with some reason. I admit, it is very different from this case ; for it does not appear, that there was anything here, that the son could gain : but I do not choose to lay it down, that under any circumstances such a transaction can be set aside. I do not know, what debts the father might have paid for this young man. I cannot tell under these circumstances, how much of this sum of 3,000*l.* might have been applied for the son. I should make wild work in letting the son come and complain at any distance of time. What was there unreasonable in tying himself up to an estate for life, and leaving it to his children ? Perhaps under these circumstances it would be better for him. But, though transactions of this kind will be looked at with jealousy, that the father should not take an improper advantage of his authority, the complaint must always be made in time ; not after the father is dead, and the son has entered into an act, by his marriage, under which immediately, the moment it is celebrated, persons unborn acquire a right.

The case of *Prodgers v. Langham* ‡ was relied on to shew, that

† Br. C. C. 369.

‡ 1 Sid. 133.

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circumstances *ex post facto* may make good a settlement, that might have been impeached. The meaning of it is, that though the estate does not appear to have been settled on the marriage, it may be intended to be an inducement to consent to the marriage; and then the father shall not afterwards set up a subsequent conveyance for valuable consideration; to put an end to that conveyance, upon the faith of which that marriage was contracted. *Kirk v. Clark*;† *Roe* on the demise of *Hamerton v. Mitton*, a case at law, proceeds pretty much upon the same ground. Observe the argument of Chief Justice WILMOT. The mother had given up nothing; for she only changed her annuity from the whole to a part of the estate. How they wanted the assistance of the mother, what good it did, I cannot see. The Chief Justice states the objection thus:

“But it was objected, that John was seised, and could have made the settlement without the mother; and that in truth no real or good consideration moved from her at all; for that she still had her annuity charged upon part of the lands: in answer to this the applying to the mother shews, that John Hamerton could not have made a settlement agreeable to the lady’s friends without the mother.”

[878]

That I do not see at all.

The Chief Justice adds, that any consideration given by the mother would have made her a purchaser for her younger sons; and by the limitation to the daughters of the marriage after that to the two brothers of John Hamerton, it was as plain, the mother intended her sons should be preferred, as if she had said, she would not change her security from the whole to a part of the lands, unless he would do that.

Observe, what sort of consideration this apparent consideration moving from her is; and, whether the principle must not be, that those concerned in it had in contemplation this remainder to the other sons; and that was sufficient to protect it.

Kirk v. Clark† is an extremely strong case. Parol evidence was given of some discourse as to this settlement: but that I do not think makes much difference, for it is not to be supposed, the parties are ignorant of the circumstances of the person going to

† Pre. Ch. 275.

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marry. The father had settled the reversion of the copyhold estate upon the son, for the purpose of lessening the fine to be paid. The parol evidence was, that afterwards upon the treaty for the son's marriage the friends of the lady proposed to have the copyhold estate settled with a leasehold estate; stating, that they relied chiefly upon the copyhold as an equivalent for her fortune; upon which the father said, he had settled that already upon his son. But it is very extraordinary, that it made no part of the articles, independent of that evidence.

[*879]

Am I to be told, when a man having an estate settled upon him and his sons in strict settlement by an unimpeached deed, has married, am I to say, after that, this was a voluntary conveyance; and therefore he is tenant in tail; and the issue of the marriage are not to have any interest? I say, that is a fraud; *and a person going to treat, and holding himself out so, is guilty of fraud. The answer is, the wife and the issue of the marriage are purchasers; and he must be considered seised according to that deed. It does not appear here, that it was regarded as the principal inducement; but it might be so. The lady had a right, the children have a right, to have it considered, that he had the estate, which he appeared to have; and I should do gross injustice in taking away that benefit. Therefore I am of opinion, though it does not appear, that the friends of the wife did speculate upon this, and take it into consideration, it must be presumed, they did act upon it; and the husband has not a right now to disturb it. Upon the principles of these cases, no notice being taken of this before, and there being great doubt, whether a court of equity would interfere, unless gross injustice appears, I must hold it impossible, unless the son makes his complaint in reasonable time; when the circumstances can be known, and these family transactions can be unravelled. If I see a father taking away the estate from his son without consideration by the influence of his authority, that is a strong case: but here it is impossible for me to know, how he maintained the son; or, whether any of this money was applied for him. There is no one to sustain the question. The issue of the marriage stand in a more favourable light than the other persons in remainder over.

Upon the whole this is not a case, in which the Court can compel the trustee to act, or anything to be done; unless the plaintiffs can set it aside at law. Therefore without determining, whether this is a void settlement at law, I cannot give the relief prayed. The ground I go upon, without entering into the question, how far relief could be given, if all the circumstances were brought before the Court recently and during the father's life, is, that after a marriage, by which the first and other sons were entitled to legal estates, protected by trustees to preserve contingent remainders, I cannot upon this bill in the absence of persons, who may claim, indeed, before their birth, interfere to have the legal estate taken out of them.

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The bill therefore must be dismissed.

LORD ASHBURTON v. LADY ASHBURTON.†

(6 Vesey, 6—7.)

1801.
April 20.

ELDON, L.C.
[6]

Personal property of an infant ordered to be laid out in the purchase of land; though there was no authority in the will for changing the nature of the property: but it was ordered, that the estate purchased should be conveyed in trust for the infant, his executors and administrators, till he should attain twenty-one, and afterwards for him and his heirs.

LORD ASHBURTON by his will, dated the 4th of April, 1780, taking notice, that he had engaged to settle 1,000*l.* a year by way of jointure on Lady Ashburton, directed an investment in the funds or other securities for that purpose; and not then having any issue he declared, that he left his real property to descend to his sister; and his personal estate he gave to his father, in case he should survive him (the testator); if not, then to his sister.

By a codicil, dated the 31st of October, 1781, taking notice of the death of his father and the birth of a son, the testator gave directions for the maintenance and education of his son; and as to his real estate, which would descend to his son, desired it might be under the care and management of his executors and

† *A.-G. v. Marquis of Ailesbury* (1887) 12 Ap. Ca. 672, 57 L. J. Q. B. 83.

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guardians of his son; and, after giving 5,000*l.* to his sister in addition to his note for that sum, he gave all the residue of his personal estate to his executors, in trust to place out the same and the rents and profits of his real estate in real or government securities, as they should from time to time judge best, during his son's minority; and out of the produce thereof or of any real estate to pay what they should judge proper for his maintenance and education; the whole surplus to accumulate during his minority; and upon his attaining the age of twenty-one to pay, assign, and transfer, the whole principal and interest to him or his order: but in case he should die under age, and the testator should have no other child, who should attain that age, he gave his wife, if then living, 20,000*l.* in lieu of her annuity, or 10,000*l.* in addition, at her option, and the whole residue with the accumulations to his sister.

By another codicil, dated the 1st of June, 1788, the testator taking notice of the death of his eldest son, and having a second, substituted him for the other with the same disposition over.

[*7] The testator died soon afterwards, possessed of very large property in the funds; leaving issue the present Lord Ashburton, the son mentioned in the second codicil; who when of the age of eighteen, presented *a petition, suggesting an opportunity of laying out a considerable part of the said sums in the purchase of lands in the county of Devon, where all the rest of the petitioner's landed property lies; and praying, that he may be at liberty, when and as convenient purchases may offer, to lay proposals before the Master for investing the funds in land.

Mr. Romilly, in support of the petition.

(The LORD CHANCELLOR asked, whether there was any instance in which the Court took upon itself to change the nature of the property in such a case, where there was no clause in the will authorising it.)

Mr. Alexander (amicus curiæ) said, he had known orders upon this subject at the Rolls; and mentioned one case; in

which the land purchased was directed to be conveyed to a trustee, in trust for the person interested, his executors and administrators, until he should attain the age of twenty-one, and afterwards for him and his heirs.

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The LORD CHANCELLOR approved that qualification; and made the order accordingly.

LYTTLETON, Ex PARTE.†

(6 Vesey, 7—8.)

1801.
April 20.

ELDON, L.C.

[7]

Access to a lunatic by a person entitled upon the death of the lunatic in default of appointment by her, to see, whether she was in a state to exercise the power, refused.

ONE object of this petition in lunacy was, that the petitioner, who was entitled upon the death of the lunatic, in case she should not exercise a power of appointment, might have access to the lunatic, either personally or by physicians, for the purpose of seeing, whether she was in a state to make an appointment.

Mr. Agar, in support of the petition.

The LORD CHANCELLOR asked, whether there was any instance of an order for access to the lunatic upon the principle of *quia timet*; and, no instance being produced, his Lordship refused the *application; observing, that such a visit may be very dangerous, and have a very bad effect in irritating the mind of the lunatic from the mere purpose of the visit without any intention of producing that effect.

[*8]

† *In re B*—('91) 3 Ch. 274, 60 L. J. Ch. 766.

1801.

May 2, 5.

ELDON, L.C.

[43]

GODFREY v. DAVIS.†

(6 Vesey, 43—51.)

An illegitimate child not entitled under the description of a child in a will; though the testator knew the state of the family, viz., several illegitimate and no legitimate children.

A bequest to a particular description of persons at a particular time vests in persons answering the description at that time exclusively.

Therefore an annuity being bequeathed over upon the death of the annuitant to the eldest child of A., there being at the death no child, an afterborn child is not entitled.

JOHN CREE by his will required, that all his estates, real and personal, should be converted into money after his decease, and placed at interest upon solid land security (mortgage); and the issue and profits thereof annually to be disposed of in manner following: *Imprimis*, To his daughter Eleanor Cree (afterwards Eleanor Davis) the annual sum of 300*l.* during her life, to be paid half yearly; to James Cree 100*l.* per annum, for his life, payable half yearly; to James M'Mahon 200*l.* per annum, for his life, payable half yearly; and in case of his death his widow Ann M'Mahon to receive during her life 100*l.* per annum, half yearly. The testator then gave the following annuities, also payable half yearly; to Miss Elizabeth Francis 300*l.* per annum for life; to John Godfrey, Esq. 100*l.* per annum for life; to John Byrn 100*l.* per annum for life; with remainder to his daughter Caroline Byrn for life; to Jane Harris 60*l.* per annum; to John Parsons 40*l.* per annum; to revert to his daughter after his death; to James Archdekin 100*l.* per annum; and 100*l.* per annum to David Godfrey. The will then proceeded thus:

[*44] “ And the first annuity of the great ones that drops in I will and desire may devolve upon the eldest child male or female for *life and in two half yearly payments of William Harwood; and in case the interest of my property produces a sum more than sufficient to answer the payment of the several annuities herein specified then the proportion of the annuities to increase; but if less to diminish in the like due proportion excepting the annuities of Miss Jane Harris and my butler John Parsons. And I hereby will and require that as the said annuities drop in their amount is to go to the increase of the annuities of the survivors, so to

† *Holt v. Sindrey* (1868) L. R. 7 Eq. 170, 175.

increase to the last survivor who shall hold the same during life: Jane Harris and John Parsons excepted. And when the said annuitants are all dead the whole and sole property devolve without any condition upon the heirs male of Philip Francis Esq. of St. James's Square, and in default of issue to female branch of the said family of Philip Francis Esq. taking the name and arms of Cree."

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The testator died in 1791 soon after the execution of the will. David Godfrey died upon the 15th of May, and Eleanor Davis upon the 24th of June, 1798. The eldest daughter of William Harwood claimed the annuity of 300*l.* a year; which claim was disallowed on the ground, that she was a natural daughter. An exception was taken on her part to the report. It was proved, that the testator was very intimate with Harwood and his family; and knew he had no legitimate child; and that this daughter and all his other children were treated by him as his children.† The parents of these children married several years after the testator's death. That exception was disallowed.

Another claim was afterwards set up to the same annuity by Clara Elizabeth Harwood, as the only legitimate child; having been born after the marriage. Her claim being also disallowed by the Master, she took an exception to the report; which came on to be argued.

Another question was made at the Bar, but not determined: supposing her claim well founded, whether she was entitled to the annuity of 300*l.* a year or 100*l.* a year.

Mr. Romilly and *Mr. Benyon*, in support of the exception :

[45]

The cases of *Baldwin v. Karver*,‡ *Heathe v. Heathe*,§ and others of that class, are distinguished from this; as in those there were two classes of children; and then there can be no doubt the intention is in favour of all those children, who shall be alive at the time the contingency happens; for if the distribution is not confined to some particular period, it cannot be ascertained, who are to take, until after the deaths of the parents

† *Cartwright v. Vawdry*, 5 Ves. 530. See *ante*, p. 108.

§ 2 Atk. 121. See cases collected in *Mr. Sanders's note*, 122.

‡ *Cowp.* 309.

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of all the persons to take: which leads to this inconvenience; that none of the persons, for whom the fund is intended, may receive any benefit from it. But this is confined to one person. The testator, knowing the parent was unmarried, must have had in contemplation the birth of a child in future. He had in contemplation the survivorship of these annuitants, until the last of them should be dead. In that event only he gives it over. *Weld v. Bradbury*† is an authority in support of this exception; though certainly different in its circumstances. There are no words in this will requiring the object of this bequest to be alive at the death of the testator, or of the annuitant; who dropt. If she had been alive at the death of the annuitant, she would have been entitled within many modern cases; the last of which is *Middleton v. Messenger*.‡ This is not like those cases, where the distribution is to be among all the children *in esse* at the death of the tenant for life. This is not confined to the period of any life; but might last during several lives. In that respect it differs from *Congreve v. Congreve*.§

Mr. Alexander and Mr. Cox, for the surviving annuitants:

The claim of the illegitimate child was rejected; because no intention was sufficiently expressed in her favour. Phrases occur in this will, singularly denoting, that the testator intended the person to take to be alive at the death of the annuitant. Upon the whole will there can be no doubt, that if this child had not been born for ten years, the existing annuitants would have enjoyed the annuities dropping in increase of their own annuities. It must be contended, in order to maintain this exception, that, even if the ultimate limitation had taken effect, the whole interest should go back upon the birth of a child, after all these events were past. Upon the old cases no one could take, who was not in existence *at the date of the will.|| The construction, that afterwards prevailed, was, that those must be intended, who came into existence before the death of the

[*46]

† 2 Vern. 705.

‡ *Ante*, p. 1 (5 Ves. 136).

§ 3 Bro. C. C. 531.

|| *Northey v. Strange*, 1 P. Wms. 340.

testator. Afterwards every one was let in, who answered the description, before the fund became disposable in some way. * *

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DAVIS.

Upon what principle can *Ellison v. Airey*,† and the other cases be distinguished from this? If all the children were intended, the construction of the Court confining it was directly against the intention. The question must rest entirely upon the principle originally laid down in that case, and invariably acted upon since. It is said, upon this construction no person might take the benefit of this: but this is a case, in which there might or might not be a child of Harwood existing at the time the annuity falls in. Can the construction be determined by the event? There certainly might be a person existing at the time; which clearly distinguishes it from * those cases, in which of necessity there could be no person existing at the time. The express disposition of the annuity at the moment it falls in to the surviving annuitants negatives all idea of suspension. But the general rule, admitted to be the result of the authorities, is sufficient to over-rule this exception.

[*47]

Mr. Romilly, in reply:

This case does not fall within the general rule; and no case is produced in circumstances like it. Taking the will and the facts as to the state of the family together, well known to the testator, he must have had the intention maintained by this exception. He must have intended a legitimate child, according to the decision upon the former exception. He was aware of the probability, that one of the annuities might soon fall in: so many annuities being given, and not to young people. It is impossible upon the will not to see the intention. He must have had in contemplation a period, that might be distant, and some person, of whom he knew nothing; which distinguishes this case from *Congreve v. Congreve*; where, if not confined, it must have extended to a time, when all the objects of bounty might be dead. Such a limitation as this clearly means only, that there shall be a person standing as the representative of that family at some distant period; having no view to particular persons. * * *

† 1 Ves. sen. 111.

GODFREY *THE MASTER OF THE ROLLS (after stating the case) :

†
DAVIS.

May 5.

[*48]

Upon the former exception by the eldest of the illegitimate children of Harwood, a daughter, who claimed as the person intended by the description of "the eldest child," it was contended, that though by the determinations, that have taken place, no one can claim under the description of a child but such as can claim as a legitimate child, yet upon the circumstances appearing in evidence, the situation of Harwood's family not unknown to the testator, a family of illegitimate children, recognised by their father as his children, that daughter was entitled to the annuity falling in, as *persona designata* in this will. Upon that exception I was of opinion, there was not sufficient to entitle an illegitimate child to claim; for, whatever the real intention of the testator might be, and though it could hardly be supposed, he had not some children then existing in his contemplation, yet as the words are "the eldest child," such persons only could be intended, who could entitle themselves as children by the strict rule of law; and no illegitimate child can claim under such a description, unless particularly pointed out by the testator, and manifestly and incontrovertibly intended, though in point of law not standing in that character. Notwithstanding the evidence of the testator's knowledge of the situation of this family, I did not think, that entitled these children to claim under this description. Therefore I over-rule that exception.

[*49]

Another claim is now brought forward by another daughter of Harwood by the same mother; who being born after the marriage of her parents has certainly a right to claim as the eldest child; provided, the testator did not intend upon this will a disposition at a given period. With respect to this the first consideration is, whether upon this will enough appears *to prove, the testator intended, that immediately upon his death these annuities should take place: whether the whole produce of his property, though portioned out into annuities, was not manifestly intended to be divided among all these annuitants in different proportions, according to the degree of their annuities; and I am of opinion, that it is neither more nor less than a division of the whole interest of his

fortune, that might arise during the lives of any of the persons there named, be it more or less, in proportion to their annuities, except the two given to Harris and Parsons, which I lay totally out of the case upon this question; with the qualification, that if any die, there should be a substitution in the room of the first dying. I am not under the necessity of saying, which are to be considered the great annuities. I consider all as the great annuities for the purpose of entitling the child of Harwood to the first, that might fall in. In the view I have of this will it makes no difference, whether the right of survivorship and of substitution in favour of the person described as the eldest child of Harwood attached upon the first or the second of the annuities now vacant.

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DAVIS.

The next question is, whether, as upon the death of the first annuitant there was no person answering that description living, that annuity was to be divided among the survivors, or to be suspended, and the profits to accumulate, to see, whether any such person should come *in esse*. It is clearly established by *De Visme v. Mello*,† and many other cases, that, where the testator gives any legacy or benefit to any person, not as *persona designata*, but under a qualification and description at any particular time, the person answering that description at that time, is the person to claim; and if there are any persons answering the description, they are not to wait to see, whether any other persons shall come *in esse*: but it is to be divided among those capable of taking, when by the tenor of the will the testator intended the property to vest in possession. That case was much considered by Lord THURLOW; and seems to have settled the law upon the subject. The first question is, whether it is clear, the testator meant, any given set of persons should take at any given time: if so, it is clear, all persons answering that description, whether *born before or afterwards, shall take: but if there are no such persons, it shall not suspend the rights of others: but they shall take; as if no such persons were substituted. Before that case this point was not quite so clear: *Singleton v. Singleton* and *Ayton v. Ayton*.‡ Where the gift is to all the children of A. at twenty-one, if there is no estate for

[*50]

† 1 Br. C. C. 537.

‡ 1 Br. C. C. 542, note.

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life, it will vest in all the children coming into existence, until one attains the age of twenty-one. Then that one has a right to claim a share; admitting into participation all the children then existing: so, if it is to a person for life, and after the death of that person then to the children of A. the intention is marked; that until the death of the person entitled for life no interest vests. When that person dies, the question arises, whether there are then any persons answering that description: if so, they take, without waiting to see, whether any others will come *in esse*, answering the description. If it is given over, in the event that there are no children, and there are no children at that period, the person, to whom it is given over, takes. It is clear, this testator meant these annuities to commence at his death: and that each annuitant should receive a proportionable share of his fortune, with benefit of survivorship and right of accruer, subject upon the death of the first annuitant to the substitution of the eldest child of Harwood. Upon the death therefore of the first annuitant, unless there was some one, who had a right of substitution in the room of that person, (and there was no such person,) it was to go among the survivors. The person substituted, viz. the eldest child of Harwood, not having been then in existence, cannot now claim. That construction is much fortified by the manner, in which it is given over; for it is perfectly clear, he meant the persons, to whom it is given over under the description of the heirs of Francis, to take upon the death of the persons, to whom it was first given over. If the construction contended for is to prevail, those persons, supposing all the other annuitants, claiming by survivorship, were dead, must wait not only the death of the survivor, but also the death of Harwood; for during his life there would be a possibility, that a child might be born: who upon that construction might say, he was the survivor. That would be quite contrary to the words and what must be supposed the intention. Much stress was laid upon the event of the former exception; that not having in his contemplation the illegitimate children, or at least not having described them sufficiently, he *might mean a child hereafter to be born. But that does not follow: that, because by incorrect words he had not described

his intention, so as to enable the Court to determine in favour of an illegitimate child, I am on that account to make a different determination on this point. It appears, he must have intended a person existing at the time any of these annuitants dropt; or to borrow an expression from the case of *Thellusson v. Woodford*,† of which we have heard so much lately, all the candles must be burning together. That must be the intention; and he could not mean, that there might be a person in embryo, to come out after the deaths of all the annuitants.

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DAVIS.

Upon these grounds and upon the construction of the will being of opinion, that the interest in these annuities was intended to vest in possession, and unless there was some person to claim under the substitution, the whole interest would survive to the others until the death of the last survivor, and that there was no person to answer that description at the time the event took place, I think, the Master was right in rejecting this claim; and the exception must be over-ruled.

I shall not decide the question, which of these are to be considered the great annuities.

MUCKLESTON v. BROWN.‡

(6 Vesey, 52—69.)

1801.
May 6, 8

ELDON, L.C.
[52]

Bill by the heir at law against residuary devisees, legatees, and executors; suggesting a secret trust, undertaken at the request of the testator, either not legally declared, or, if so, void as to the real estate, and written acknowledgments by the defendants of an intended trust for charitable purposes: the will also by equal legacies to them, and some particular expressions, importing a trust. A general demurrer to the discovery and relief was over-ruled.

THE bill stated, that the plaintiffs were co-heirs at law of Isaac Hawkins; who being seised of the manor and estates of Overseal in the county of Leicester, applied to the defendants Isaac Hawkins Brown, and the Reverend Thomas Gisborne, and to the Reverend John Hepworth, to act as trustees in the execution of certain trusts; upon which he had devised or bequeathed, or proposed to devise or bequeath, all the rest and

† 4 R. R. 205 (4 Ves. 227).

(1884) 26 Ch. D. 531, 537, 53 L. J. Ch. 654.

‡ See *In re Boyes, Boyes v. Carritt*

MUCKLESTON residue of his real and personal estate not otherwise disposed of;
v.
BROWN. and that they or some or one of them having agreed to take upon themselves or himself, the execution of the trusts, as Hawkins did then or should duly declare, he made his will, dated the 9th of August, 1798; reciting, that the plaintiffs were his co-heirs; and specifically devising certain estates to each of them and to another person respectively in fee; and giving several legacies: and as to all and every other his real estates whatsoever and wheresoever not before disposed of and the residue of his personal estate, subject to the payment of his debts and legacies, he gave and devised the said real and personal estates unto his good friend and relation Isaac Hawkins Brown, Esq. also to his kinsman the Reverend Thomas Gisborne, of, &c. and John Hepworth, Rector of Eggington in the county of Derby, and their heirs; and he appointed them to be executors of that his will.

[*53] By a codicil, dated the 29th of November, 1796, the testator reciting, that since the making his will he had purchased two *small farms, one at Overseal, the other at Hilton in the county of Derby, gave and devised such farm and all his lands and estates at Hilton aforesaid to the Reverend Thomas Gisborne and his heirs for ever; and as to the farm at Overseal he devised the same to Gisborne and Brown and to their heirs; "upon trust for the like uses and purposes as my manor and estate at Overseal now stand limited." He then gave several legacies; concluding with legacies to Brown and Gisborne of 1,000*l.* each; all which legacies or sums of money he directed to be paid to the several legatees by the executors named in his will within twelve months after his decease.

The bill farther stated, that Hepworth died in the life of the testator in 1795; and the testator died upon the 6th of February, 1800; that the defendants entered upon and took possession of the residue of the testator's real and personal estates; that the manor of Overseal was not specifically devised; but was included in and passed by the general devise of all the residue of his real estates; that no use or purpose was by the will or otherwise declared of the same; and it appears by the codicil, that the said manor and estates at Overseal should be held by

Brown, Gisborne, and Hepworth, upon certain trusts. The bill then stated applications to the defendants, and their pretences, that the plaintiffs are not entitled as co-heirs to the residue of the real estates, the same being by the will and codicil devised to the defendants absolutely; and charged, that it is manifest from the codicil, that the devise was to them as trustees; and that the testator did not intend them to take any beneficial interest in the residue of his real and personal estates; and that they were so fully convinced, that such was the purpose and intention, that they have repeatedly acknowledged the same; particularly Gisborne in a letter to Brown; which the bill stated; and which, as far as it was material, was in the following terms:

“It was as early as the spring of 1789, and probably earlier, that the testator explained his intentions and wishes upon the subject in question to me. To the best of my recollection the testator stated, that he proposed to bequeath to his heirs at law in certain proportions the estates he had inherited; and, after providing for Miss Wilkinson, and, I presume, for any specific *legacies, to bequeath the whole residuum of his estates real and personal to his executors, not however for their private emoluments, but in full confidence, that conformably to his intentions they would have laid out the whole of it in charity or for charitable uses: I think, those were the precise terms: and am certain, they fully explain his meaning. He then mentioned the other executors; and proposed to me to be a third; to which I assented; and assured him, I would faithfully perform according to his intentions my share of the trusts (for so I considered it), if it should ever devolve upon me. He said, we must repay ourselves out of the residuum all expenses incurred in executing his intentions. I understood him also to mean, that we were not to have any specific legacies. I have a faint recollection, that he said, we might keep what we thought fit for our trouble: but I did not hear him say anything, that would have authorised me, even supposing he had left me no specific legacy, to retain for my own use, had I been so disposed, anything material; and I have no idea, I should have thought it right to have taken anything. I understood him to have had public charities, primarily at least, in his own view; though I do not say, exclusively.

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Though I cannot absolutely recollect his using the word 'private,' I am particularly sure, that appropriating to private charity whatever we might find ourselves legally excluded from assigning to public charities would fulfil the spirit of his intention. I expressed my wishes to him, that his will should specify, that the bequest was not intended for our private emolument, but for charity : but he intimated decidedly, that it would not be done without invalidating the bequest. Whether he distinctly named the mortmain † or other statutes, as those, which in that case would destroy the bequest, I cannot say positively. I asked him to give me some information as to the particular kind of charity, to which he would have his executors appropriate part or the whole of his bequest : but he always replied, that we should be the best judges, or to that import. I requested written directions. His answer did not excite in me any hope, that he would give any. He once said, it would be very large : approaching 200,000*l.* Many years after the original disclosure of his intentions he expressed a wish, that a farm he had *purchased should go to the benefit of the descendants of the family, from which he purchased ; and said he must do something for the poor of Barton ; talking of settling 12*l.* a-year or some such sum. His conversation afterwards threw no farther light upon his intention."

[*55]

The bill then set forth a statement, drawn out by the defendant Brown, of his conversations with the testator, and his opinion of the intention ; the material parts of which are, as follows :

" *February 10th, 1800.*—The first time I saw him after Mrs. Hawkins's death he said, he intended to leave the residue of his real and personal estate to me and Gishorne ; giving reason to suppose, we should have discretionary powers as to the application ; unless we received particular directions ; which I expected. I considered it to be his intention, that a considerable part was to be disposed to charitable uses, and another part, perhaps considerable, was to be given in private donations, not only to those, who were objects of charity, but to persons, who had claims upon his generosity ; one of whom he described ; and all of whom I hoped he would have mentioned in some papers of his own writ-

† 9 Geo. II. c. 36.

ing; and that a third part I might legally reserve to my own use; though it was never my intention to do so; because he said, I might keep what I pleased to myself. The impression upon my mind was not altered by subsequent conversations, except in the following particulars. He told me, he had made another will; but had not made any alterations (except as to executors). He told me, he intended to leave me a specific legacy; which I guessed to be 1,000*l*. In one conversation I said to him, the real estate might be affected by the Mortmain Act. He said, it was impossible; because I and Gisborne or the other executors (for I do not recollect, whether it was after the alteration in the trusts) would have the full and legal right to the whole residue: the distribution would be our own act and deed; or to 'that purport.' "

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BROWN.

The bill farther stated, that the defendants pretend, the testator has by some writing or otherwise declared the trusts, upon which they and Hepworth were intended to take the residue of the real estate; and that they are willing to hold the said estate to and for *the objects of such trusts; and charging, that the said testator hath not legally or in any effective manner declared the trusts, and, that if he hath declared the same, they are as to the real estate of the testator, of which he was seised at the time of his death, null and void, prayed a discovery; and that the plaintiffs may be declared entitled as co-heirs to the residue of the testator's real estates, on account of the residue of the real estates, and the rents and profits received by the defendants, and general relief.

[*56]

The defendants put in a general demurrer to the discovery and relief.

The *Solicitor-General*, Mr. Romilly, and Mr. Cox, in support of the demurrer :

If this case stood upon the will alone, it would be without question a devise of the whole beneficial as well as legal estate to the defendants: but upon the codicil it will be said, a trust is declared of the estates at Overseal; or, if not declared, the intention of the testator, that they should not be taken beneficially by the executors, is manifest. The trust does not appear. It is not

MUCKLESTON sufficient for the plaintiff to shew, that there might be a disposition for some person by some other instrument. It might be in trust for the heir or a stranger : but that person coming for relief must shew, that he is entitled to it. It is not however to be admitted, that this is the interpretation of the codicil. Though awkwardly expressed, it may be referred to the payment of the debts and legacies ; to which by the will the residue of the real and personal estate is subject. There is therefore a plain and obvious sense to be attributed to these words in the codicil without referring to any other trust. From the legacies given to the executors by the codicil, 1,000*l.* to each it might be contended, that it is impossible they should take the beneficial interest in the whole of this property : but in all they receive under the will they have a joint estate ; and these legacies are distinct : the intention therefore is perfectly inconsistent ; to give them a joint interest in the general residue and a separate interest in these legacies. * * *

[58] *Mr. Mansfield, Mr. Lloyd, and Mr. Fonblanque, for the plaintiffs :*

[59] * * The construction, that the words in the codicil “ upon trust for the like uses and purposes as my manor and estate at Overseal now stand limited,” can refer to that part of the will, which subjects the real estate to the debts, is impossible. * * If the trust is not sufficiently declared, why is not the heir to avail himself of it ? Shall these defendants, having agreed to take the estate upon trust, take it discharged of the trust ? In this sense it is a fraud upon the heir : a secret trust ; which, if inserted in the will, would be void ; and the heir would take.* * *

[62] *The Solicitor-General, in reply. * * **

[The principal cases cited by counsel are referred to in the judgment.]

LORD CHANCELLOR, stating the case with great particularity, delivered his opinion :

[63] * * It is not immaterial, that the suggestion of the bill, that the testator applied to the defendants to act as trustees, is much

fortified in Gisborne's letter ; for it admits, he had communication with the testator as early as 1789. The allegation is, that he applied to them to act as trustees in the execution of certain trusts ; upon which he had devised or bequeathed, or proposed to devise or bequeath, the residue of his real and personal estate ; and that they agreed to take upon them the execution of the trusts ; as he did then or should duly declare ; which, I admit, means "effectually declare." But *still, if it is necessary to put the case upon that ground, that they had agreed to accept the devise upon such trusts as he should duly declare, I am not quite prepared to say, it is clear, that, if he made the devise, meaning at the time thereafter duly to declare trusts, and it happened, that he did not declare any, that sort of case would not be within the equity of this Court ; and whether, if they admitted, his will was made upon an undertaking, that they would execute such trusts, the heir would not have a right to say, no trust was duly declared : the purpose therefore failed ; and the trust results by law to him, not upon the intention, but upon the ground, that there is no intention ; and he is entitled to avail himself of that. Upon that ground therefore the bill must be answered.

Strong as the testator's purpose appears upon Gisborne's letter, he did not feel himself quite equal to disappointing his heirs ; and therefore he specifically devises some estates to them. If the case stood simply upon the will, the defendants are as to the personal estate trustees, not merely by virtue of the office, but by express bequest. The legacies of 1,000*l.* to each of them in the codicil being equal legacies, the inequality in the amount of the testator's bounty as to the real estate would not alter the inference, that they were to have only the office of executors ; and the equality of the legacies would make them trustees of the residue of the personal estate. I do not know a case, in which a legacy by a subsequent instrument has attached a trust upon the residue under a prior instrument ; but I do not know a case to the contrary ; and a strong inference arises, that they should not have the whole, of which the legacies of 1,000*l.* were a part ; and that is very material here ; for it gives countenance to the first allegation in the bill ; that, before the will was made, the testator applied to them to know, whether they would take the estates

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MUCKLESTON upon trusts, which he would or would not declare; and it raises
 v. upon just grounds and principles a supposition, that even between
 BROWN, the dates of the will and codicil there might have been some uses
 and trusts, either effectually or ineffectually declared, which at-
 taching themselves upon the gift of the residue of the personal
 estate by the will would explain, why the testator gave the legacies
 of 1,000*l.* by the codicil to them, to whom by the will he had
 given the whole residue of his personal estate. Though it must
 [*65] necessarily *be admitted, that if there were nothing more than
 the will and codicil, I must put this construction upon the latter,
 that all these words “uses, trusts,” &c. would be satisfied by
 that, which is really not, strictly speaking, a use or a trust, but
 a mere charge upon the real estate; if it should be necessary to
 have resort to it in case of a deficiency of the personal estate, yet
 upon the will and the codicil, attending to the particular nature
 of the expressions, and connecting the particularity of the ex-
 pressions and the inference to be thence deduced, with the
 allegation, that the defendants did undertake to take by a devise
 expressive of some uses, intents, and purposes, the Court is
 authorised to hold, that, though this might have been the con-
 struction of the will and codicil alone, it may not be the
 construction, the whole case being taken together.

In the allegation, that no use or purpose was by the will or
 otherwise declared, I construe the expression “use or purpose,”
 as contradistinguished from “trust.” Though in one sense a
 trust is a use or purpose, it is capable of being used in a distinct
 sense; as I think it was by the person, who drew this bill. The
 latter part of that passage admits of two interpretations; that in
 fact the testator has not declared any use or purpose; or, that
 in law he has ineffectually declared; or, that the effectual declara-
 tion made has failed. The question as to that must be answered
 by looking at the whole context. I do not think the defendants
 bound to answer the question, whether it is not manifest by
 the will and codicil, that they are trustees. That must be tried
 by the contents of the will and codicil. The letter of Gisborne
 discloses communications between him and the testator from the
 spring of 1789 to the execution of the will and codicil; and Gis-
 borne appears to have enjoyed a great deal of his confidence.

It is most distinctly disclosed in that letter, that the testator projected an evasion of the law. Whether he looked to private donation or public charity, whatever was the nature of the charity he meant to establish, a distinct communication appears in this letter, that he dared not put his purpose in writing on account of the Statute of Mortmain. That is a purpose, in aiding which I can go no farther than the law obliges me either on the part of him, who projects it, or of him, who promotes it by adopting the execution of it. On the other hand I can go no farther in *destroying that purpose than the law furnishes the means. But the policy of the law requires, that courts of justice should distinctly state, that it is incorrect conduct in both parties, both him, who projects such a purpose, and him, who carries it into execution. Though there is great weight in the argument upon *Adlington v. Cann*,† that if a trust is declared, yet if it is so loose and uncertain, how much is for charity, how much for private disposition, that the Court cannot see specifically, what is the subject, upon which the trust is to attach, it is very difficult, I agree, to attach any trust, I am not prepared to say, upon this letter alone the Court would be at much loss; or would feel much difficulty upon the statement of Brown. An intention is disclosed in that letter not altogether consistent with the other: but it is not to be denied, that each of those papers leaves a great deal to be disposed of in charity, according to the declarations of the testator himself; and if the declaration of trust reserved to the defendants a power of disposing to such charities as they should think proper, I am not quite sure, the heir has not a right to call upon them to say, whether they have done so; or mean to do so; and how much they mean to dispose of, and to give him the rest. It is a fair subject of argument, whether Gisborne's apprehension of the testator's meaning would bind the Court; or whether the Court would not say from the apprehension of the testator as to the Statute of Mortmain, the purpose would apply to the whole of the property.

A very material part of the bill is, the allegation, that the defendants pretend, the testator has by some writing or otherwise declared the trusts, upon which they were intended to take

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† 3 Atk. 141.

MUCKLESTON ^{v.} BROWN. the residue of the real estate; and that they are willing to hold upon such trusts: and charging, that the testator has not legally or in any effective manner declared the trusts; and if he has declared them, they are as to the real estate, of which the testator was seised at the time of his death null and void. They might be void at his death, but good at the time they were created. Surely the heir has a right to know, whether the trusts were legally declared, and continued effectual to the testator's death. If bound to answer those questions, they may say, there was a trust, a writing; and that, if effectual, they must act according to it. The heir may say, the trust was not well declared, or has become *ineffectual in the whole or in part. [*67] In this view of the case beyond all question the defendants must answer this bill; and if they must answer as to any of the allegations, it is very unnecessary to say at present, whether they must answer as to the other part. I will not prejudice that part of the case farther than by saying, that upon an allegation of this kind, a trust against the policy of the law, the Court does insist, they shall answer it.

In *Adlington v. Cann* † there was no trust upon the face of the will: but a paper was written afterwards, which clearly demonstrates, that the testator's intention was to devote the benefit to charitable purposes. If it rested there, it is clear, a man cannot by an unexecuted instrument attach a trust upon real estate. But they pleaded the statute. That must have been allowed to be a good plea; unless the LORD CHANCELLOR could have said, though they plead the statute, yet, if they answer, admitting the trust, it would be fit to discuss at the hearing, whether he would not give the heir the benefit of the resulting trust. Otherwise he would have allowed the plea at once; for they would accept; because there was no answer to the charge, that the defendants knew the secret trust, &c. They must have answered those exceptions, I think, upon the subsequent cases. When the cause came on again, the plea, the benefit of which was saved to the hearing, was certainly beneficial; for it alleged, that, if there was nothing more in the case than a will expressing no trust, and a paper that could not be read, and no admission of the

trust by the defendants, there was nothing in the cause applying to the conscience of the defendants, or raising the argument upon the policy of the law, or in favour of the heir; that if the intention cannot be effectuated according to law, he shall take the estate upon the ground, that it is not effectually disposed of. In a subsequent case † Sir Thomas Parker, who must have known *Adlington v. Cann*, took upon himself to examine it; and when it was very material to be accurate upon it; and he says ‡ expressly, Lord HARDWICKE compelled the defendants to answer. If so, we see in a subsequent case, how Sir THOMAS SEWELL, no mean authority, a Judge very able and conversant in equity cases, understood it; and this appears also to be the history of *Adlington v. Cann* by a note of Serjeant Hill. In the case before Sir Thomas Sewell the original answer simply stated the will. A farther answer was required; and by the farther answer the defendants *stated, that there was a memorandum, not duly executed according to the Statute of Frauds: and that memorandum did certainly point to a disposition of the real estate to charitable purposes. Sir THOMAS SEWELL went a great length upon that, I confess. If he had said, the law would authorise him to hold that a sufficient denotation of an intention, that the devisees should be trustees, the difficulty would be, how he came to read that memorandum. But he took it in another way; that, as they set forth the memorandum, they admitted the purpose of the testator, and put it, not upon the effect of the memorandum *vi sua*, if I may so express it, but as taken as their admission. I doubt, whether that is quite correct reasoning: but still it furnishes an authority; for Sir THOMAS SEWELL might be wrong in the fact, that that was an admission: but his opinion is an authority in point of law, that, if there was an admission, he would execute the trust. Then it comes to this; that the doctrine of the Court is, that the defendant shall answer in such a case; and if he answers in the affirmative, there is a resulting trust for the heir.

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Cottington v. Fletcher § does not affect this case. That case was upon the grant of an advowson contrary to the policy of the

† *The Attorney-General v. Duplessis*,
Park. 144.

‡ Park. 160.
§ 2 Atk. 155.

MUCKLESTON ^{v.} BROWN. law, by a Roman Catholic in trust for himself. Afterwards he turns Protestant; and desires a discovery as to his own act. The defendant put in a plea of the Statute of Frauds; but by answer admitted the trust. Lord HARDWICKE is made to say, that upon the admission he would act. I do not know, whether he did act upon it; but it is questionable, whether he should; for there is a great difference between the case of an heir coming to be relieved against the act of his ancestor in fraud of the law, and of a man coming upon his own act under such circumstances. It is there said, it might be different, if it had come on upon demurrer. The reason given is, that as this assignment was done in fraud of the law, and merely in order to evade the statutes, it was doubtful, whether at the hearing the plaintiff could be relieved. Lord HARDWICKE means to say, that, if the defendant admits the trust, though against the policy of the law, he would relieve: but if he does not *admit the trust, but demurs, he would do, what does not apply in the least to this case; the plaintiff stating, he had been guilty of a fraud upon the law, to evade, to disappoint, the provision of the Legislature, to which he is bound to submit, and coming to equity to be relieved against his own act, and the defence being dishonest, between the two species of dishonesty the Court would not act; but would say, "Let the estate lie, where it falls." That is not this case.

[*69]

Then as to the principle: why should it not be so? Surely the law will not permit secret agreements to evade what upon grounds of public policy is established? Is the Court to feel for individuals, and to oblige persons to discover in particular cases, and not to feel for the whole of its own system, and compel a discovery of frauds, that go to the roots of its whole system? Suppose, the trust was to pay 100*l.* out of the estate; and the devisee undertakes to pay it, if it is not inserted in the will: this Court would have compelled an answer, on the ground, that the testator would not have devised the estate to him, unless he had undertaken to pay that sum. The principle is, that the statute shall not be used to cover a fraud. If that is so between individuals and upon an individual claim, there is surely a stronger call upon the justice of the Court to say upon a private bargain between the testator and those who are to take

apparently under his will, which is to defeat the whole of the provisions and policy of the law, that they shall be called on to say, whether they took the estate, as they legally may not do, for charitable purposes. It is very difficult to say, that, if the justice due to individuals obliges them to disclose in the one case, the justice due to the public shall not oblige them in the other. I am very glad to find upon the authorities, that they are to make the disclosure. It is difficult to say in sound argument, that the principle of policy is not sufficient: but I do not mean to decide upon this. The other grounds, that I first stated, are quite sufficient. If I am bound to say, whether the bill stating the letters does or does not make a difference, I can find no authority, that the defendants shall not answer, whether they put the declaration of trust in writing.

Upon the former of these grounds therefore I over-rule this demurrer.†

WALKER v. FROBISHER.‡

(6 Vesey, 70—72.)

1801.

May 7.

Award set aside: the arbitrator having received evidence after notice to the parties, that he would receive no more; in which they acquiesced.

ELDON, L.C.

[70]

THE object of the bill in this cause was to quiet the plaintiff in the possession of his mill; after he had recovered damages in two actions against the defendant for using his mill in a manner, that impeded the use and enjoyment of that belonging to the plaintiff. When the cause came on before Lord Rosslyn, his Lordship with the consent of the parties directed a reference to *Mr. Busfield* to settle the matter in difference between the parties, and award such alterations to be made in the defendant's works as to him (*Mr. Busfield*) should seem necessary; regard being had to their state previous to June, 1794.

The arbitrator by his award found, that the working of the plaintiff's mill had not been impeded to any material extent, if

† This case was afterwards argued for judgment, was compromised.

upon the answer, admitting the † *Moseley v. Simpson* (1873) L. R. 16 Eq. 226, 234, 42 L. J. Ch. 730.

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at all, by the alterations of the defendant's ; regard being had to their state previous to June, 1794 ; and he directed, that the defendant's works should be continued in the same state, as they were ; but that, as they were made of wood, and easily alterable, certain parts of the machinery should be made of cast iron. The award did not direct any other alteration.

A motion was made to set aside this award upon the following facts disclosed by two affidavits.

At one of the meetings the arbitrator expressed his opinion, that the inlets to the defendant's mill were too deep ; but not so much too deep as the plaintiff insisted they were ; and that the truth lay between them. After several witnesses had been examined on both sides in the presence of the parties or their attorneys, the arbitrator advised the parties to produce no more witnesses ; declaring his determination to examine no more witnesses in the cause : but on the day, which he had settled for finally arranging his award, and on which he had directed the surveyors to attend, whom he was authorised to call in, and had called in, for the purpose of assisting him, three persons attended on the part of the defendant ; and the arbitrator examined those three persons ; and took minutes of what they said ; although no person attended on *behalf of the plaintiff ; and the arbitrator then made his award, as above stated.

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The arbitrator by his affidavit stated, that he had examined all the witnesses produced before him on either side at different meetings for that purpose ; and having fully made up his mind on the subject on the 3rd of February he appointed the surveyors to meet him on the 10th for the purpose of preparing the award : but, one being unable to attend, he had adjourned to a future day to make his award. On the 10th of February several persons came into the room, where the deponent and the surveyors were, unattended by the solicitors on either side ; and did mention some circumstances relative to the matters in dispute ; of which the deponent believes he made some minutes : but they were at the same time told by him, that he had previously satisfied his mind on the subject ; and he should proceed to make his award.

The affidavit farther stated, that nothing, which passed, had

the least weight with him ; and that the award contains his decided opinion before the 10th of February and since ; and he denied to the best of his recollection having said at any meeting, that the defendant's inlets were too deep, or having expressed any opinion whatsoever on the subject.

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Mr. Sutton † and *Mr. Heald*, in support of the motion :

* * They contended that the arbitrator had not pursued his authority ; and the answer admitting, that the mills were not in the same state, as they were previously to June, 1794, was conclusive against the defendant ; and the arbitrator was bound to award such alteration as would bring them to that state. [They referred to *Morgan v. Mather* (2 Ves. J. 15) 2 R. R. 163.]

Mr. Lloyd and *Mr. King*, in support of the award :

Urged, that the parties had produced all the evidence in their power on either side ; and the affidavits do not insinuate, that any new evidence was or could have been pronounced. They insisted, that *the award was consonant to the order of reference, to award such alterations as to the arbitrator should seem necessary ; and there was no necessity for him to award any alteration ; if he did not think it requisite.

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Upon the last point they were stopped by the LORD CHANCELLOR ; who said, in that respect the arbitrator had properly exercised his power.

LORD CHANCELLOR : ‡

This award cannot be supported. The arbitrator, having been named by the late Lord Chancellor, is, I am well assured, a most respectable man : but he has been surprised into a conduct which upon general principles must be fatal to the award. It does not appear to me, that he has by the award improperly exercised the authority given by the order of reference : but on account of the transaction, that took place on the 10th of February, the award cannot stand. He had examined different witnesses at different times in the presence of the parties. He recommended to them not to produce any more witnesses. To that recommendation they accede ; and in effect say, " Upon the

† *Ex relatione.*

‡ *Ex relatione.*

WALKER view of what is disclosed to you do what is right between us.”
 FROBISHER. After this he hears these other persons ; and he admits, he took minutes of what was said. It did not pass as mere conversation. It does not appear, that he afterwards held any communication with the other party ; or disclosed what passed to him : but the arbitrator swears, it had no effect upon his award. I believe him. He is a most respectable man. But I cannot from respect for any man do that, which I cannot reconcile to general principles. A Judge must not take upon himself to say, whether evidence improperly admitted had or had not an effect upon his mind. The award may have done perfect justice : but upon general principles it cannot be supported.

1801.
 April 22, 24.

PULTENEY v. WARREN.†

(6 Vesey, 73—94.)

May 11.
 ELTON, L.C.
 [73]

Account of mesne profits, since the title accrued, decreed against executors upon the special ground, that the plaintiff was prevented from recovering in ejectment by a rule of the Court of law and by an injunction at the instance of the occupier ; who ultimately failed both at law and in equity.

The simple case of the death of the occupier will not sustain a bill for an account of the mesne profits under the head of accident.

THIS cause arose in consequence of the final decision of the causes of *Lady Cavan v. Pulteney*,† and *Lord Darlington v. Pulteney*, concerning the validity of the leases granted by the late General Pulteney of several houses in Sackville Street, Piccadilly. The result of those suits being against the leases, this bill was filed against the executors of the late Dr. Warren, one of the tenants, for an account of the mesne profits in respect of the house occupied by him from July, 1791, when the possession was required by the plaintiff, to July, 1797.

The circumstances and dates were these. Upon the 2nd of July, 1790, Dr. Warren and the other tenants received notices to quit. Upon the 5th of July, 1791, a formal demand to quit was served upon them. In Trinity Term 1791 an ejectment was brought in the Court of King's Bench by Sir William Pulteney

† *Phillips v. Homfray* (1883) 24 Ch. D. 439; 52 L. J. Ch. 833. † 3 B. R. 8 (2 Ves. J. 544).

against Spottiswood, an under-tenant of Lady Cavan, one of the lessees; who by a rule of the Court was admitted to defend the action in the room of Spottiswood. The demise in that ejectment was dated the 6th of July. Issue was joined upon a plea of the general issue; and at the trial after Michaelmas Term, 1791, a special verdict was found; which was argued in Easter Term, 1794; and a final judgment was obtained by the plaintiff upon the 24th of May, 1794. Soon afterwards Lady Cavan sued out a writ of error returnable in the House of Lords. In Easter Term, 1794 other ejectments were brought by Sir William Pulteney against Dr. Warren and all the other occupiers; who pleaded the general issue; and in Trinity Term following upon their application to the Court of King's Bench an order was made in each of these actions, that the proceedings should be stayed; the defendants undertaking to abide the event of the special verdict in the cause against Lady Cavan, and not to bring any writ of error for delay. Upon the 7th of May, 1795, the judgment obtained against Lady Cavan was affirmed in the House of Lords. The bill of Lady Cavan, Dr. Warren, and the other tenants, was then filed; and the bill of *Lord Darlington; and upon the 1st of May, 1795, the order for the injunction was obtained in those causes; with liberty to move to dissolve it, in case the plaintiffs should not set down their causes for hearing in Michaelmas Term ensuing. Under that order the injunction issued upon the 29th of July; and, the causes not being set down pursuant to the order, a motion to dissolve the injunction was made in Michaelmas Term 1795. That motion was refused. Upon the 3rd of June, 1797, Lord Darlington's bill was dismissed; and upon the 3rd and 19th of June the order was made in the other cause, retaining the bill for twelve months; the plaintiffs to be at liberty to bring actions in consequence of their eviction; and an inquiry was directed, how the assets of General Pulteney were disposed of; and the injunction was dissolved. Upon the 16th of December, 1797, the minutes of that order were varied by inserting a direction, that the plaintiffs should not take out execution in those actions till farther order. Upon the 17th of June, 1797, Sir William Pulteney moved the Court of King's Bench for leave to enter up judgment against Dr. Warren; which

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PULTENEY was ordered in Trinity Term. Upon the 22nd of June, 1797, Dr.
 v. WARREN. Warren died. Upon the 19th of July following possession was
 delivered by his executors.

The bill represented, that the plaintiff was prevented by the order made by the Court of King's Bench for staying the proceedings from entering up judgment against Dr. Warren; and that before the necessary application could be made to that Court for leave to enter up judgment, the bill was filed by the tenants; upon which the injunction was obtained.

The defendants by their answer insisted, that they ought not to account for the mesne profits demanded by the plaintiff; the same not being recoverable at law or in equity; and suggested, that the plaintiff stood by; and allowed Dr. Warren to lay out considerable sums in improvements. They also filed a bill against Sir William Pulteney: praying a discovery as to that among other things; and whether Sir William Pulteney did not know previously, that the lease was void. The answer to that bill stated, that most of the expensive alterations were made before the decision of the point; that the defendant never concealed, but avowed, his intention to break the lease, if
 [*75] he could; that he did not know, in 1794 or *1796, that Dr. Warren had laid out large sums; and that the estate was managed by his agent.

A treaty had been entered into for ascertaining the mesne profits, and making an allowance in respect of the improvements: but they could not agree.

Mr. Alexander, Mr. Romilly, and Mr. Dowdeswell, for the plaintiff.

Mr. Mansfield and Mr. Fonblanque, for the defendants.

[The arguments of counsel and the cases cited by them sufficiently appear from the judgment of the LORD CHANCELLOR.]

May 11. LORD CHANCELLOR stating the case, and observing, that the
 [86] Court of King's Bench in making the rule for staying the proceedings in the several actions of ejectment for some reason, not apparent, and perhaps, because they might think, there was a

question fit to be agitated in equity, did not add as a term, that the defendants should bring no suit in equity, and that it was clear, that, if there is any mode of recovery at law, it cannot be by an action of trespass for mesne profits, delivered his judgment.

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The plaintiff insists, that he has a remedy for these mesne profits in equity; more especially as he was by the act of the Court of King's Bench and the subsequent act of this Court upon the application of Dr. Warren, restrained from proceeding during his life; and that the plaintiff ought not to be injured by the consequences of that act, preventing him from pursuing his legal remedy. In the argument at the bar it was considered, 1st, With regard to the claim, in case the plaintiff had not been restrained from proceeding by the acts of Dr. Warren in the Court of King's Bench and in this Court; and it was said, that, though it is true, a personal action dies with the person as to the injury committed in the fact constituting the cause of that action, yet if the personal injury has been committed with a profit to the party doing that injury *there is both in law and equity a remedy sufficient to extract out of his pocket that profit, which he has reaped by his injurious act, and, that this bill may be sustained upon the general ground. It was argued, that this is a principle, which may be demonstrated by the reasoning in *Hambly v. Trott*,† as far as the doctrine of law is to be looked to; and it is said very truly, that all natural justice is with the plaintiff; who is now clearly to be taken to be entitled both in law and equity to the possession from the moment he made the demand; and if so, the mesne profits are consequential upon his obtaining possession; and therefore it is at least according to natural justice, that he should now be placed in the same situation, as if there had not been an adverse possession at law against him and these adverse proceedings in equity. It was further insisted, that merely from the circumstance of his having brought actions of ejectment, which action is founded in trespass, he cannot now maintain, upon *Hambly v. Trott* and other cases, at least for the mesne profits accrued since the ejectment, an action for use and occupation. With regard to that *Birch v. Wright* ‡

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† Cowper, 371.

‡ 1 R. B. 223 (1 Term Rep. 378).

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was cited. All which that case decides, is, that in the ordinary case of a tenant, if you bring an ejectment, you cannot afterwards bring an action for use and occupation for the rent subsequent to the demise; because, having treated his holding as founded in trespass you shall not treat it as founded in contract. That case establishes this distinction; that that rule will not apply to the time previous to the ejectment. Therefore, if that doctrine is to be applied to this case, that authority does not preclude the plaintiff from trying, what he can make of the action for use and occupation for the time between 1791 and 1794; though it would preclude him from the time of bringing the ejectment down to the recovery under it. If I was satisfied, I ought not to interpose upon the special grounds in this case, I should yield so far to the argument for the plaintiff as to that, that, finding it admitted, as it must be, that this is an application new, as far as it stands upon general principles, if it could be maintained, that an action for use and occupation would lie, that action being founded upon contract, it would follow, that they might be considered as indebted to him, and he might have a remedy against the assets. But I feel so much doubt upon that point, whether an action for use and occupation could be maintained, that I should not think myself authorised to make the decree upon the ground, that could maintain that action, without first permitting an action to be brought *upon the terms of not setting up the ejectment, the Statute of Limitations, or any other legal bar, against that action; but that it should be considered simply upon the plaintiff's title, as it stood in 1791, without embarrassment from the subsequent proceedings. The difficulty I have in supposing, that action could be maintained, turns upon this; that these parties claim under a title neither adverse, nor altogether otherwise. Taking it to be adverse, as tenants claiming under a lease, which is contended to be effectual to bind the plaintiff, that lease determines the terms of their holding; and the recovery must be upon the foot of those terms. If they do not hold under that lease, they are not in the same relation to the plaintiff as the tenant stood in *Birch v. Wright*; for he had the character of tenant: but if you say, the lease was not binding upon the plaintiff, you destroy the relation of landlord and tenant; and then there is an adverse

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title ; and it is difficult to say, they hold under that contract ; which is the foundation of the action for use and occupation. PULTENEY
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If it cannot be put upon that ground, or if it is not thought prudent so to put it, the next question is, if in no form of action, that can be devised, this question can be tried at law, has the Court upon the general case, without adverting to the circumstances of this case, a jurisdiction to say, these executors shall account for the mesne rents and profits ? To put that question correctly, I must for the present lay out of the case the fact, that Dr. Warren was with a variety of other persons a defendant in a court of law, and a complainant with those persons in this Court ; and I must look at him as being alone and individually a defendant in an ejectment ; under which the plaintiff has not been able to obtain possession, until it happened, that by the accident, as it is called, of his death the plaintiff cannot proceed in an action for mesne profits. I agree, it is impossible to consider the mere circumstance of his death as that species of accident, against which this Court would relieve. It is admitted, this case is new in its kind. It is contended however, that the demand upon the general principle can be supported by analogy to other cases. Upon the best consideration on that head they have not been able to state any case, strictly speaking analogous. I feel very strongly, that this claim is founded in natural and moral justice ; and if it could be sustained upon the general principle, the Court would be very strongly inclined to *support it : but if it is to be determined upon the general principle, it must be decisively put upon that ground, and not upon an analogy, which will not hold. With respect to the analogy, the bills by infants have gone upon the ground of infancy, and the character, in which the other party was considered to stand, as a bailiff or receiver. As to the case of the heir, without going through *Dormer v. Fortescue*, and the other cases which were all discussed in *Pincke v. Thornycroft*,† I do not know a case, in which the heir has claimed merely as heir an account, not stating any impediment to his recovering at law ; that the defendant has the title-deeds necessary to maintain his title ; that terms are in the way of his recovery at law ; or other legal impediments, which do, or which may probably,

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† 1 Br. C. C. 289.

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The case of the dowress is upon a principle, somewhat, and not entirely, analogous to that of the heir. An indulgence has been allowed to her case upon the great difficulty of determining *à priori*, whether she could recover at law, ignorant of all the circumstances; and the person, against whom she seeks relief, as was strongly observed by the MASTER OF THE ROLLS in *Curtis v. Curtis*,† having in his possession all the information necessary to enable her to establish her rights. Therefore it is considered unconscientious in him to expose her to all that difficulty, to which, if that information was fairly imparted, as conscience and justice require, she could not possibly be exposed.

The case of mines is very different upon another ground. There the bill will originally lie against the party himself: if not, I do not know, that originally it could be brought against the personal representative. The case of timber is also upon a very different principle. Lord HARDWICKE says the case of the mines is in the nature of a trade; and as to the timber, the equitable jurisdiction is put by him upon this, to prevent a multiplicity of suits; and the Court having jurisdiction with regard to the waste takes the whole together: but he states expressly, that if there is not a ground for an injunction to restrain waste, the party must go to law.

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The case of tithes is also very different. When severed they belong to the tithe-owner. It is an acquisition of property, as stated in *Hambly v. Trott*,‡ put into the possession of a party; who ought to give it to another.

Upon *The Bishop of Winchester v. Knight*§ therefore and all these cases, there must be either a difficulty to recover at law, or fraud, concealment, &c. which enables the party to say otherwise than that if he had gone to law he would have recovered. There is therefore no analogy arising from these cases. If I was obliged to decide, whether this claim could be supported upon the general principle, I should wish to hear the case further argued, before I should venture to introduce a new decision upon this subject. But I am relieved from that by the special circum-

† 2 Br. C. C. 620.

‡ Cowper, 371.

§ 1 P. Wms. 406.

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stances of this case; which make it unnecessary to decide upon the general principle. The plaintiff must now be taken in this Court to have had a clear legal right to the possession as early as 1791. In that year he brings an ejectment against one occupier. The bill does not inform me, why he abstained from bringing ejectments against the others till 1794. In that year he brought ejectments against all the tenants; and then they in a mass feel the justice of his acting against one only; and they make an application, a very proper application, to the Court of King's Bench to restrain him from proceeding against them upon this ground, distinctly stated, that they hold by the same title as Lady Cavan; and that it was equitable, that action should decide the question between the plaintiff and all of them; praying, that the plaintiff should not be at liberty to proceed one step farther against them; undertaking, that the recovery against Lady Cavan should bind them, as far as the law was to deal between them; asserting therefore, that the plaintiff acted with great propriety in forbearing to bring actions against them till 1794. In law therefore they identify their case with Lady Cavan's. It was not adverted to in the Court of King's Bench, that there was a manifest call of justice upon them to have done more; and I am entitled to say so upon their ordinary practice; taking care, that inquirers shall not prejudice the ultimate rights of parties by the effect of their rules, operating as injunctions. If a verdict had been obtained in an action for damages, which that Court might think excessive, they would hardly grant a new trial without taking care, that the plaintiff in the interim should not lose all benefit of the verdict by *the death of the defendant. I allude now to the rule with great propriety adopted in the case of Lord Dorchester† and a gentleman in the west of England. It would have been perfectly just in this case to have said, the defendants should put the plaintiff in the situation, in which he would have been, if they had not interposed. That however was not added. I do not stay to examine, whether it was necessary, that the judgment in the ejectment should precede the action for mesne profits: but if it was necessary, the plaintiff could not avail himself of the judgment, affirmed in 1795, on account of

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† *Pleydell v. The Earl of Dorchester*, 7 Term Rep. B. R. 529.

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the bill filed in this Court; insisting, that notwithstanding the recovery at law still it was against conscience, that the plaintiff should have the possession on account of the circumstances, making it equitable, that he should not avail himself of his legal rights. Upon that ground the injunction was obtained. If that injunction was not capable of being maintained at the hearing, and it was not suggested to the Court to provide against accident as to the mesne profits, I cannot agree, that it is the plaintiff's fault; because he does not ask enough. It is the duty of the counsel to inform the Court; and if they do not, and the Court happens not to have acted upon its information up to the point, which it ought to have reached, it is bound to relieve the party, as far as it can, from the injustice, to which the shortness of its proceedings may have exposed them. If upon the application for the injunction the question had been put, whether the Court would expose the defendant in that cause to the hazard of losing the rents and profits of the premises by the death or insolvency of the plaintiffs, and the Court had been reminded of the justice due to the defendant in its full extent, it is impossible that injunction should have been granted without the terms, that a fair rent for the premises should be brought into Court from time to time, that the Court might be in possession of a fund, that would enable it to do justice, whatever accident might happen during the time necessary for the consideration of the question, whether he, who had recovered at law, could sustain the benefit of that judgment.

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It has been said by *Mr. Fonblanque*, the action for mesne profits may be maintained, though no judgment has been obtained in *ejectment*. I will not trust myself with the decision of that question in this cause. In *Norton v. Frecker*† Lord *HARDWICKE* says, trespass will not lie for mesne profits, till the possession is recovered by *ejectment*. I will not say, there can be no action, founded upon the old learning: but under these circumstances I am not bound to determine that; for, if in the ordinary action for mesne profits the plaintiff might have recovered what he now seeks in equity, and if under the circumstances of this case he has been restrained from proceeding in

† 1 Atk. 524.

that action, and all conscientious views of the case require me to say, he would have been restrained in any other action from receiving them, it would be very hard, that, because he did not make the experiment, whether that other species of action could be maintained, the Court will give him no relief. If there be a principle, upon which courts of justice ought to act without scruple, it is this ; to relieve parties against that injustice occasioned by its own acts or oversights at the instance of the party, against whom the relief is sought. That proposition is broadly laid down in some of the cases. The case, in which the Court would not relieve, though the interest went beyond the penalty of a bond, *Duvall v. Terry*,† still strikes me as a very strong case. If the plaintiff submitted to nothing, by the mere circumstance of filing the bill he would be taken to submit to every thing conscience and justice require. Upon that principle he would be held to do that, which is just ; and the Court duly acting with him would compel him to pay the principal, interest and costs, occasioned by his delay. It may be said, that is a relief given against a plaintiff, coming for relief. I consider these persons as plaintiffs, asking an injunction, and impliedly saying, they ask it upon the terms of putting this plaintiff in exactly the same situation, as if it had been determined, they were not entitled ; for otherwise there is no colour of justice calling upon the Court to discuss the question, whether they are entitled to equitable relief. The case of a *remanet at nisi prius* was put. If the application is founded in fraud, or concealment, or misrepresentation, I am not prepared to say, a court of equity might not find the means of relief in that sort of case ; but it is very different, where the party applies, not upon his notion of what the law is, but upon the fact, to the existence of which he does not administer by his conduct. Upon that it seems there *can be no relief in equity ; for it is not the act of the parties ; but a necessity arising out of the act of third persons, affecting their rights ; not done at the instance of either of them : the occasion not furnished by their acts. The case was also put of a creditor prevented from obtaining judgment by the act of this Court ; and the question, whether he ought to be considered as a judgment

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† Show. P. C. 15.

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creditor. I will not say, what the answer might be to the case, put so generally. A court of law always takes care, that a creditor so prevented shall be put in the same situation, as if he had his judgment, and no such application had been made; and I rather think, in every instance of an application for an injunction it is the duty of the Court to consider, whether the party ought not to have the benefit of his judgment; and if the Court decides wrong, I should be sorry, if the Court had not the means of reinstating him.

The ground therefore, upon which this case is decided, is, that the *res gestæ* shew, that Dr. Warren has amalgamated and mixed himself with the other tenants. The equity as to all of them arises from their joint act, operating to prevent the plaintiff from having that redress at law, which in all moral probability he would have had, if this Court had not interfered; and which in all moral justice he ought to have had. I had considerable doubt, how far back the account ought to go. It ought to go back, as far as natural justice requires. Where there has been an adverse possession, and upon an application to this Court upon grounds of equitable relief the plaintiff appears entitled to an account of the rents and profits, if there has been a mere adverse possession, without fraud, concealment, or an adverse possession of some instrument, without which the plaintiff could not proceed, the Court has said, the account shall be taken only from the time of filing the bill; for it is his own fault not to file it sooner. But the question here is, not, what relief is due to the plaintiff with regard to the period, at which this bill was filed, but attending to the circumstances stated by this bill, forming the facts of the prior causes in this Court. Attending to those circumstances, the question is, if it had not been for what passed in those prior causes, would not this plaintiff have recovered from 1791: and do not the circumstances of those causes demonstrate, that he was substantially and in conscience proceeding adversely from that *period, until he was restrained from farther proceedings; giving notice to quit; and making a formal demand of the possession; abstaining, as, they say themselves, it was fit he should abstain for ever, from bringing any other action except that against Lady Cavan. He has therefore

demanded the rents and profits from 1791 down to the decree in the other causes. If he had brought an action for mesne profits, as soon as he could upon the ejectment, the production of the record would have entitled him from the day of the demise. But it is equally clear on the other hand, that would not necessarily have prevented him from recovering from the time his title accrued; provided he gave them an opportunity of questioning that title; for I take it to be clear, he is not bound to demand no more than from the day of the demise. He may, if he pleases to put the title in hazard, insist upon the mesne profits from the time the title accrued; saving only the benefit of the Statute of Limitations: but then he must prove his title. He would therefore have been entitled to the rents and profits from 1791. If so, upon what ground is he not entitled in equity from the same period?

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The decree must therefore be according to the prayer of the bill. As to the mode of estimating the mesne profits, it will be better, that they should settle that among themselves.

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(6 Vesey, 119—129.)

1801.
June 6.

ELDON, L.C.

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A fair dissolution of partnership between two: one retiring; and assigning the partnership property to the other; and taking a bond for the value and a covenant of indemnity against the debts: the other continued the trade separately a year and a half; and then became a bankrupt. The Lord Chancellor was of opinion, the joint creditors had no equity attaching upon partnership effects remaining in specie; and at all events such a claim ought to be by a bill, not a petition.

Various modes of dissolution of partnership; and the consequences.

In June, 1797, Thomas Cooper of Epsom, brewer, took James Cooper into partnership. That partnership was *dissolved by articles, dated the 3rd of November, 1798; under which the buildings, premises, stock in trade, debts, and effects, were assigned to James Cooper by Thomas Cooper; who retired from the trade. Upon the 2nd of April, 1800, a commission of bankruptcy issued against James Cooper; under which the joint

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† *Ex parte Butcher* (1880) 13 Ch. D. 465. See now Partnership Act, 1890, s. 20.—O. A. S.

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creditors attempted to prove their debts; but the Commissioners refused to permit them; upon which a petition was presented to Lord Rosslyn; who made an order, that the joint creditors should be at liberty to prove; with the usual directions for keeping distinct accounts, and an application of the joint estate to the joint debts, and of the separate estate to the separate debts. At a meeting for the purpose of declaring a dividend the Commissioners postponed the dividend, in order to give an opportunity of applying to the Lord Chancellor; in consequence of which this petition was presented; praying, that the partnership effects remaining in specie, and possessed by the assignees, may be sold; and that the outstanding debts may be accounted joint estate.

By the articles of dissolution the parties covenanted to abide by a valuation to be made of the partnership property; and James Cooper covenanted to pay the partnership debts then due, and to indemnify Thomas Cooper against them; and Thomas Cooper covenanted not to carry on the trade of a brewer for twenty years within twenty miles of Epsom. A bond for 3,000*l.*, the calculated value of the partnership property assigned, was given to Thomas Cooper by James Cooper and his father, as surety. In pursuance of the covenant the partnership property, consisting of leases, the premises, where the trade had been carried on, stock, implements, outstanding debts, and other effects, were valued by arbitrators at 2,030*l.* after charging all the partnership debts then due. James Cooper by his affidavit stated, that all the joint creditors knew of the dissolution and the assignment of the property; that advertisements were published; and the deponent after the dissolution received many debts due to the partnership; but paid more on account of the partnership. His father by affidavit stated, that he paid the interest of the bond regularly; and intended to pay the principal, when due.

Mr. Romilly and Mr. Cullen, for the joint creditors, and Mr. Bell, for Thomas Cooper:

If one partner can by assigning all his interest in the effects prevent the joint creditors from going against those effects, fraud

must be the consequence. The partners may *agree to divide the effects, and carry on business separately. By this agreement between the partners the whole fund of the joint creditors is taken away. Upon the principles, upon which the effects, joint at the date of the bankruptcy, are applied to the joint debts, effects, joint at the dissolution of the partnership, and remaining the same in specie at the time the commission issues, should be considered joint property. The ground is, that credit has been given upon the faith of the joint property; and it is a fraud upon the persons giving that credit to apply that fund to the separate creditors, trusting only to the individual and to the separate effects; and that ground applies equally to this case. * * That an actual assignment divesting partnership property out of one partner will not defeat the right against the partnership effects, is proved by *Ex parte Burnaby*.† No evidence is produced to shew, that the separate creditors *thought this was separate property; and gave credit accordingly: it must therefore be taken, that they knew, it was not. The assignment is made upon condition, and subject to the payment of the partnership debts. A considerable part of the property consisted of debts; which are not assignable.

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But this question has been decided by the order made by the late LORD CHANCELLOR.

Mr. Mansfield and Mr. Cooke, for the assignees :

No such attempt was ever made before under such circumstances: a fair dissolution; and an assignment by one partner of all the effects to the other; and trade carried on by that other; and at this distance of time. * * Thomas Cooper is a solvent partner, endeavouring to get what he can through the medium of the joint creditors. It is perfectly immaterial to them; for he is solvent; and able to pay them. The petition is in truth his. If this was not a complete assignment, it will be impossible to draw the line. Why may not joint creditors as well at the end of twenty years fix upon a house or any specific article, once partnership property? * * There is no pretence of fraud. The consideration was a bond; but the question is

† 1 Cooke's Bank. Law, 253, 4th edit.; 8th edit. by Mr. Roots, 269.

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precisely the same, as if it was paid in money. The trade was carried on a year and a half; and there is nothing to shew, that any one looked on Thomas as a partner. The effect would be, that until all the joint debts are paid, there never could be a complete assignment from one partner to another. * * In *Ex parte Burnaby* it does not appear, that any one of the partners had gone out; nor, when Crispe committed the act of bankruptcy; which might have been prior to the assignment. That assignment was merely of the share of one to the other, not attended with any dissolution of the partnership; which in this case was actually dissolved; and the share legally assigned. The partnership subsisting up to that time, there was a right to insist, that the partnership debts should be paid.

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With respect to the lien, in the case of *Lodge and Fendal*,† to which your Lordship has referred, Dr. Fendal had paid 10,000*l.* into a banker's hands; and immediately afterwards Lodge stopped payment. The utmost contended for there was, that the assignees of the separate estate might be at liberty to prove that sum, not to take it out. Lord THURLOW there established the rule, that unless there was a transmutation of the estate by fraud, the creditors must take it, as it happened at the time of the bankruptcy. That rule has been since acted upon in other cases, and the law is established, that the date of the act of bankruptcy is the commencement of the lien; and until then there is no lien. * * *

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Mr. Romilly, in reply :

Though this order was not made by Lord ROSSLYN upon argument, it certainly did not pass as a mere matter of course. This must be decided as a general case. There is one very important fact; that there were outstanding debts to a very considerable amount. None of those debts could be collected but by action in the joint names of the two partners until the bankruptcy, and now, of the assignees. The effect therefore was not to make James Cooper the legal owner: an equitable interest only could be transferred, subject to all equities, and therefore to the equitable lien upon the covenant to pay all the debts; to

† 1 R. R. 99 (1 Ves. J. 166).

which these outstanding debts, as well as the other property, were liable. The joint creditors claim, not by way of lien, but as having by the rules established in this Court an equitable claim upon the joint property, in preference to the separate creditors, until the former are paid twenty shillings in the pound.

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* * These petitioners only say these specific effects subsisting in the hands of this partner, ought to be applied. *Ex parte Burnaby* is an express decision upon the point. The ground of this claim is upon the assignment, not the dissolution; which is immaterial: but how can one partner assign all his property to the other without a dissolution? As to the fraud, suppose, the person going out is insolvent: a case extremely likely to happen.

LORD CHANCELLOR:

This case is admitted, unless *Ex parte Burnaby* applies to it, to be new in its circumstances. Therefore, if I was of opinion, that the petition could be supported, I should be very unwilling to express that in bankruptcy; where my opinion would not be subject to review. If the case I have mentioned has decided the point, there is the authority of Lord HARDWICKE upon it; which would weigh down the most considerable doubt, that I could be disposed to entertain. I feel great difficulty in complying with the prayer of the petition; and, when I read it, was struck with it, as a new case; and as one, upon which I do not clearly see my way to the relief prayed. It is the case of two partners; who owed several joint debts; and had joint effects. Under these circumstances their creditors, who had a demand upon them in respect of those debts, had clearly no lien whatsoever upon the partnership effects. They had power of suing, and by process creating a demand, that would directly attach upon the partnership effects. But they had no lien upon or interest in them in point of law or equity. If any creditor had brought an action, the action would be joint: his execution might be either joint or several. He might have taken in execution both joint and separate effects. It is also true, that the separate creditors of each by bringing actions might acquire a certain interest even in the partnership effects; taking them in execution in the way, in

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that house now the property of the partnership, was *bonâ fide* bought by one of the partners; and the money was invested in the purchase of the new house, in which they were going to reside: suppose a still more improbable case, that a year and a half or ten years afterwards they became bankrupt: would that house be part of the partnership effects? It would be so, if it remained without the legal interest being passed, or without any equitable claim, taking it out of the reach of a legal execution: but where the effect is a *bonâ fide* transaction of this sort, if it were held at any time afterwards to be partnership property, not for the purpose of satisfying demands of the partners, or of any creditor, who cannot otherwise be satisfied, but to enable them to undo all the intermediate equities, commercial transactions could not go on at all. It would be much less inconvenience to examine the *bona fides* of each transaction than to say, such transactions shall never take place.

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The case of *West v. Skip*† falls within some of the observations I have made. *Heath v. Percival*‡ does not apply at all. The bond in that case was not given up; and therefore the creditor keeping *the best security, and refusing to part with it, no inference can be made against the conclusion arising from that. *Hankey v. Garratt* is also very different. There the partnership was dissolved by bankruptcy or by death; and there was no actual transfer of the property to take it out of the reach of legal execution. I am unwilling to make any observation upon *Burnaby's* case. I do not know how to understand it. Whether there was any thing special in the assignment, I cannot find out from the report. I shall endeavour to find the papers. It looks very like this case; if it is in specie this case, as an authority I should think myself bound to submit to it. But if it is not in specie this case, there is so much doubt, whether this relief can be given, that I am satisfied, it ought to be given, if at all, in a jurisdiction, where my opinion would be subject to review. My present inclination is, that the creditors have not this equity. I have considerable doubt also, whether, if they have it, Thomas Cooper would be benefited by it; and a farther subject of grave and serious doubt is, whether, if the joint

† 1 Ves. sen. 239.

‡ 2 P. Wms. 682.

creditors disturb the arrangement, the separate creditors would not have a right to set the arrangement right at his expense.'

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I now think, there is a circumstance that distinguishes *Burnaby's* case. The assignment was not by one to the other two, but by one to one of the other two: which may be very different. I think, that circumstance distinguishes the case so much, that I shall consult the interest of the parties better by saying, they may file a bill, if they think proper, than by farther delay.

The petition was dismissed.

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(6 Vesey, 174—194.)

1801.
May 8.
June 9.
July 6.

ELDON, L.C.

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Bill to charge a trustee, as having by delivering the title deeds to the tenant for life enabled him to make a mortgage of a settled estate as tenant in fee, dismissed; the fraudulent purpose of enabling him to mortgage resting upon the evidence of a single witness, and being positively denied by the answer, as far as the allegations of the bill gave an opportunity of answering; but without costs, on the ground of negligence; and without prejudice to an action; and with an option to the plaintiff to take an issue.

It is an old head of equity, that if a representation is made to a man, going to deal on the faith of it in a matter of interest, the person making the representation, knowing it false,† shall make it good; and the jurisdiction assumed by Courts of Law in such cases will not prevent relief in equity.

It is not a general rule in equity, that a second mortgagee, who has the title deeds, without notice of a prior incumbrance, shall be preferred: negligence alone will not postpone the first: it must amount to fraud.

By indentures of lease and release, dated the 8th and 9th of September, 1792, William Stansell, a biscuit baker at Bristol, conveyed to Elizabeth Reed, also of Bristol, her heirs, executors, administrators, and assigns, respectively, certain freehold and leasehold estates, by way of mortgage for the sum of 300*l.*; and it was provided, that Hawkins, an attorney, was to receive the rents and profits, and to apply them in the first instance to the interest, and then to accumulate them for the discharge of the

† *Taylor v. Russell*, '91, 1 Ch. 8, 60 53 L. J. Ch. 629.
L. J. Ch. 1; *Northern Counties of England Fire Insurance Company v. Whipp* (1884) 26 Ch. D. 482, 488, † *Derry v. Peek* (1889) 14 App. Ca. 337, 58 L. J. Ch. 864; *Low v. Bouverie*, '91, 3 Ch. 82, 60 L. J. Ch. 594.

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principal. At the date of the mortgage the only interest Stansell had in these estates was under a settlement, executed in November, 1785, previous to his marriage with Elizabeth Bicknell; by which all the said leasehold and freehold estates were assigned and conveyed to John Bicknell and John Taylor, their executors and administrators, and heirs and assigns, respectively; upon trust for the separate use of Elizabeth Bicknell for life; remainder to the use of Stansell for life; remainder to the children, as he should appoint, and, in default of appointment, equally; with a reversionary interest to Stansell in default of children. They had issue two children. Afterwards, two or three years before the mortgage, Stansell became insolvent; and separated from his wife.

Elizabeth Reed having married Evans, the bill was filed by them; stating these circumstances; and that the real title of Stansell had been discovered since the mortgage; that all the title-deeds had been upon the marriage delivered to Bicknell, the trustee; and charging a design to raise money upon the credit of the premises; and that Bicknell delivered the deeds out of his custody for the purpose of enabling Stansell to represent himself to the plaintiff to be the owner of the premises; that he has admitted or declared upon different occasions and in the hearing of different persons, and that Stansell at the time of the application informed him, he wanted them for the purpose of obtaining credit; and he made such declaration or admission in the presence of the plaintiff and Hawkins, the solicitor, and the defendant Taylor. The bill prayed, that the estates may be sold to satisfy the mortgage; and [*175] that the defendant Bicknell should be decreed to answer the deficiency, or the whole, if the Court should be of opinion, that the estate should not be sold.

The defendant Bicknell by his answer stated, that Stansell some years after the execution of the settlement, and prior to the execution of the mortgage, became insolvent; and assigned all his estate for the benefit of his creditors; which was a matter of notoriety in Bristol; and advertisements were inserted in the Bristol newspapers. The title-deeds were soon after the execution and previous to the marriage delivered by Stansell to the defendant Bicknell; and remained in his custody, till they were

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delivered by him to Stansell a short time previous to the mortgage; when all the title-deeds except the said settlement were delivered at the desire and with the approbation of Elizabeth Stansell to the defendant William Stansell; who promised to re-deliver them in a few hours, or next morning at the farthest. Upon the defendant's application afterwards Elizabeth Stansell admitted, she had them; but refused to part with them. He denied, that the delivery was to enable him to obtain a mortgage from the plaintiff or any one; and stated, that he never did admit or declare, in the presence of Hawkins, Taylor, or any other person, nor did Stansell, when he applied for the deeds, or at any time, inform him, that he wanted to obtain money by way of mortgage or otherwise: but he admitted, Stansell did inform him, he wanted the use of the title-deeds merely to shew or convince some person or persons, with whom he was in the habit of taking credit in the way of trade, that he and his wife were legally in possession of the rents and profits of the freehold and leasehold estates.

The defendant John Taylor, after the answer of Bicknell was put in, was examined by the plaintiffs; and by his depositions he stated, that upon the 29th of January, 1794, Elizabeth Evans and Hawkins, the attorney, came to him about the mortgage; and they and the deponent went to Bicknell; who strenuously denied, that he had delivered the deeds for the purpose of a mortgage; but at length, after much altercation and abusive language between him and Hawkins, informed them, that Stansell had desired him to lend him the title-deeds, belonging to the marriage settlement, to shew to some person, who would credit him with *goods in his trade to the amount of 40*l.* or 50*l.* upon seeing them; and the person to lend the money was to receive two years' rents; that he had promised to return them in an hour; that he (Bicknell) had lent them; and had often sent, but never could get them; and he denied, that he knew of the mortgage.

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Hawkins died, before the cause went to issue.

(The LORD CHANCELLOR early in the argument put it to the plaintiffs' counsel, whether they could not bring an action.)

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Mr. Romilly and Mr. Hart, for the plaintiffs :

With respect to your Lordship's question, whether the plaintiffs may not bring an action, they are not entitled to relief at law, upon the principles upon which *Pasley v. Freeman*† and *Scott v. Lara*‡ were determined. In this case there is no privity between Bicknell and the plaintiff ; no assumpsit or contract.

It is unnecessary to say, what the Court has done in the case of a first mortgagee leaving the deeds in the hands of a mortgagor. Bicknell had in himself the fee-simple in the freehold estate and the absolute interest in the terms for years. Giving the deeds to Stansell, enabling him to act as absolute owner, Bicknell must be answerable for all the consequences, as much as if they had followed from his own act. He knew, Stansell intended to gain a credit upon these deeds ; as he thought, only to the extent of 50*l.*, according to the witness : but his answer does not state the extent. The plaintiff is entitled to the whole of the money advanced, not merely the 50*l.* ; supposing that sum the extent of the fraud intended. * * The only instance, in which a decree has not been made against the defendant to such a bill, is the case of the *Thatched House Tavern* : § the representation being, that the object being to build, the mortgagee by parting with the deeds for an hour would improve his security ; and he would not trust the deeds with the mortgagor ; but went with him ; and staid in his house, while they were in his possession. The jurisdiction of this Court would be very defective, if it cannot from the acts of parties infer a fraud ; not relying only upon the admission. This trustee had the deeds in his possession for a double purpose ; to protect the title ; and for the general purpose of protecting the public from frauds, that might be committed by means of them. Supposing, as the Court has intimated, that the cases do not go the length of postponing a first mortgagee, who has parted with the deeds, upon mere negligence, this is more than negligence. * * Though there is no case exactly in point, yet upon the principles, on *which *Arnot v. Biscoe*|| and the other cases were determined the plaintiffs are entitled to a decree.

† 1 R. R. 634 (3 Term Rep. B. R. 51). § *Peter v. Russell*, Eq. Ca. Ab. 321

‡ 1 Peake, N. P. 296.

|| 1 Ves. sen. 95.

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Mr. Richards and *Mr. Horne*, for the defendant Bicknell :

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The bill as against Bicknell is merely an action for 300*l*. It is impossible upon this bill to arrange any equity as against Stansell. It is merely an action on the case, in the nature of an action of deceit. * * *

But supposing, the case was at law, there is no pretence for sustaining an action. They in truth admit, they have no remedy at law. *Arnot v. Biscoe* and the other cases referred to are quite different ; and that of the *Thatched House Tavern* is very strong ; the deed being given up by the mortgagee, he ought to have seen, what use was to be made of it ; yet the Court seeing no intention to defraud would not affect him. * * *

This case is admitted to be new in principle. * * If the defendant denies the charge, the plaintiff cannot have a decree upon the evidence of one witness ; unless there are unequivocal circumstances corroborating the evidence ; and in this case the circumstances, instead of corroborating, afford an inference the other way. They all lived in Bristol ; and therefore notice must be presumed.

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(LORD CHANCELLOR: It is still for the consideration of the plaintiffs' counsel, whether an action may not be maintained at law ; for if upon their state of the case this Court can interfere, I doubt very much, whether an action might not be maintained. *Then this is in truth a suit in a court of equity for damages. This defendant has got the legal estate in the freehold and leasehold ; but in both upon a trust for persons, whom you do not affect. If one *cestui que trust* has acted honestly, can the Court take away the estate, because the other has acted dishonestly ? I do not mean at present to say, that if an action can be maintained, therefore this Court will not maintain its jurisdiction, executed perhaps upon much more correct principles ; for Courts of law have taken very strong steps.)

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Mr. Romilly, in reply :

* * With respect to the supposed relief at law, there is no instance of such an action : nor can it be supported upon any principle. *Pasley v. Freeman*† and *Eyre v. Dunford*‡ are the

† 1 B. R. 634 (3 T. R. 51).

‡ 1 East, 318.

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only cases, that have the least analogy ; and it is very doubtful, whether they would bear out this case. Courts of law have carried the principle farther than courts of equity. No form of action is provided ; and that is an objection to our going to law. The objection, that relief might be had at law was of much more force in *Arnot v. Biscoe*. But at least there is a concurrent jurisdiction ; and a court of equity ought to interfere upon a case of gross fraud ; *in which it is impossible to assign a good motive. The ground in this Court is, that this man, having the legal estate and a deposit of the title-deeds, enables another person to deal with the estate, as he himself might have done, to make a mortgage ; which, if done by himself, would have made him clearly answerable.

LORD CHANCELLOR :

Though the sum, which is the subject in question, is small, a cause of more consequence to the public has very seldom been heard.

July 6.

LORD CHANCELLOR stated the case ; and delivered his judgment :

There is a peculiarity in this mortgage from the circumstance, that Hawkins, the attorney, was appointed to receive the rents and profits ; and to apply them in the first instance to the interest, and then to accumulate them for the discharge of the principal : so that it is in fact a mortgage aiming at the delivery of possession immediately to the mortgagee ; to the intent to repay the money lent by the rents and profits, as soon as possible. Though that circumstance is a peculiarity, it is not a circumstance pressing at all upon the application of any principle, that ought otherwise to dispose of the case. The question in this cause is, whether upon the doctrine of this Court the defendant Bicknell is liable to make good the deficiency to the plaintiff upon this transaction beyond the value of Stansell's interest under the settlement ; which would be the first to be applied. The bill contended at first, that this was a gross fraud on the part of the wife ; that she was privy to all the circumstances, under which her husband obtained the loan ; and gave positive encouragement to the party lending ; an allegation,

which, if made out, would be sufficient to postpone her to the mortgagee; for coverture is no excuse for fraud. Upon her answer however and the evidence it is not now, nor can it be contended, that there was upon her part either distinct fraud, or that gross degree of negligence, which this Court looks *at as fraud with regard to the consequences attaching to it. Therefore her estate, so far as it depends upon her own act, appears secure to her. The bill then fails altogether as a bill requiring a conveyance from any of the defendants to make good the plaintiff's title. From her there can be no conveyance: her estate being settled to her separate use, and protected by the legal estate of Taylor and Bicknell: the former so little implicated in the fraud or negligence, that he was examined as a witness; and therefore it is impossible to affect his estate, protecting hers; and if Bicknell was the sole trustee, it is much too strong to say, this married woman, *cestui que trust*, should be deprived of her interest, though an innocent party; because there might have been fraud or negligence in Bicknell; in whom the legal estate was. Her equity to be protected would be as strong as the plaintiffs' to have their estate made good. The Court, if it stood indifferent upon such a case, would have acted upon its usual principles.

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The question then is, supposing the husband's interest insufficient to satisfy the mortgage, whether there is a personal demand against Bicknell upon the circumstances of his conduct; and whether, if there is, it can be enforced in a court of equity. I shall dispose of the last consideration first. If there is a jurisdiction at law in such cases, there is also a jurisdiction in equity; and then, if there is a concurrent jurisdiction, there can be reason for dismissing the bill. Attending to the cases decided at law, there can be very little doubt, that a declaration might be framed upon the circumstances of this case, so that an action might be maintained, if there be fraud in the conduct of Bicknell: but it will not follow, that this Court cannot give relief. *Pasley v. Freeman*, 1 R. R. 684 (3 T. R. 51), which is the first case of its kind, proceeded upon this ground; that the defendant was averred by the declaration to have falsely, deceitfully, and fraudulently, asserted, that Falch was safely to be trusted. The action was maintained upon the ground of fraud and deceit in the defen-

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dant and damage to the plaintiff; circumstances, which were held by a majority of the judges sufficient to maintain the action. It has occurred to me, that that case *upon the principles of many decisions in this Court might have been maintained here; for it is a very old head of equity, that if a representation is made to another person, going to deal in a matter of interest upon the faith of that representation, the former shall make that representation good, if he knows it to be false; and in that case and some others there appears a disposition to hold, that if there was relief to be administered in equity, there ought to be relief at law: a proposition, that seems to me excessively questionable; and I doubt, whether it is not founded in pure ignorance of the constitution and doctrine of this Court. I allude to it the rather on account of a case frequently mentioned, *Goodtitle v. Morgan*,† in which Mr. Justice BULLER expresses himself in this manner ‡ :

“It is an established rule in a court of equity, that a second mortgagee, who has the title-deeds, without notice of any prior incumbrance, shall be preferred; because, if a mortgagee lends money upon mortgage without taking the title-deeds, he enables the mortgagor to commit a fraud. If this has become a rule of property in a court of equity, it ought to be adopted in a court of law. Here the defendants took mortgages without inquiring after the title-deeds: the subsequent mortgagee is a purchaser without notice; and as he has taken the title-deeds, he has the better title.”

The first of these propositions is certainly upon the late decisions not true. I do not wonder, that Mr. Justice BULLER stated the doctrine, as he did; for in *Ryall v. Rowles* § it is so stated by Mr. Justice BURNET,|| and without observation by the LORD CHANCELLOR, or the other learned persons, by whom his Lordship was assisted, as being contrary to the law of this Court; and in *Beckett v. Cordley*, in which I was counsel with Mr. Ambler, who had a good memory of that time, he certainly was impressed with a full conviction, that such was the doctrine of this Court.

† 1 Term Rep. B. R. 755.

‡ 1 Term Rep. B. R. 762.

§ 1 Ves. sen. 348, 375; 1 Atk. 165.

|| 1 Ves. sen. 360; 1 Atk. 168.

With regard to the second proposition of Mr. Justice BULLER, that, if this had become a rule of property in equity, therefore it *ought to be adopted in a court of law, with great deference to the learning and memory of that Judge that appears to me a very hasty proposition; and the converse undoubtedly will not hold; for it is impossible for this Court upon the principles, upon which it acts, to say, that whatever is a rule of proceeding at law is of course a rule of proceeding in equity. It may be asserted, that it should be the case: but it is impossible it can. For instance: in the case of the mortgagee, put in *Pasley v. Freeman*, if the man makes a false declaration, and an action can be maintained upon that, and the principle, upon which it can be maintained, is, that a court of equity will relieve, the converse ought to hold; that, where an action can be maintained, equity should give relief. But is that so? A defendant in this Court has the protection arising from his own conscience in a degree, in which the law does not affect to give him protection. If he positively, plainly, and precisely, denies the assertion, and one witness only proves it as positively, clearly, and precisely, as it is denied, and there is no circumstance, attaching credit to the assertion overbalancing the credit due to the denial, as a positive denial, a court of equity will not act upon the testimony of that witness. Not so at law. There the defendant is not heard. One witness proves the case; and, however strongly the defendant may be inclined to deny it upon oath, there must be a recovery against him.†

It seems to me rather surprising, if I may presume to say so, that Lord MANSFIELD, who concurred with Mr. Justice BULLER in a great many of these equitable principles in a court of law, should not have attended to these distinctions; which perhaps will be found in the very principles, upon which this Court exists. Titles to property may possibly be found to be very considerably shaken by the doctrine of the Court of King's Bench as to satisfied terms. The law as to that here is, that a second mortgagee having no notice of the first mortgage, if he can get in a satisfied term, would do that, which is the true ground

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† The incompetence of parties to be witnesses in courts of law was re- moved only in 1851 by 14 & 15 Vict. c. 99, s. 2.—F. P.

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of the decision, *though it is not put upon that by Mr. Justice BULLER: he would, as in conscience he might, get the legal estate; and by virtue of that protect his estate against the first mortgagee, having got a prior title; the conscience being equal between the parties. When once it is said at law, that a satisfied term should not be set up in an ejectment, the whole security of that title is destroyed; and therefore even with the modern correction that doctrine has received in the late cases, which is, that you may set up the term, though satisfied, and put it as a question to the jury, whether an assignment is to be presumed, it seems to me very dangerous between purchasers; and the leaning of the Court ought to be, that it was not assigned; and I fully concur with Lord KENYON, that it is not fit for a Judge to tell a jury, they are to presume a term assigned, because it is satisfied? but there ought to be some dealing upon it: or you take from a purchaser the effect of his diligence in having got in the legal estate; to the benefit of which he is entitled. Then, suppose, the law takes upon itself to decide the question between purchasers upon this subject: can it decide upon the same rule as courts of equity, as upon the question of notice? It will be said upon this doctrine, a court of equity does inquire into this; and it is a rule of property in equity; and therefore ought to be a rule of property at law. But, how has it become a rule of property in equity? In equity the first mortgagee may ask the second, whether he had notice. If that defendant positively denies notice, and one witness only is produced to the fact of notice, if the denial is as positive as the assertion, and there is nothing more in the case, a court of equity will not take the benefit of the term from the second mortgagee; placing as much reliance on the conscience of the defendant as on the testimony of a single witness; without some circumstances attaching a superior degree of credit to the latter. It is impossible therefore, that the rule of property can be said to be the same at law; and as if it stands upon different principles, in fact it is perfectly different.

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So, as to the case of *Pasley v. Freeman*.† It is almost improper at this day to say any thing, having a tendency to shake it: but I know Mr. Justice GROSE very lately held the same

† 1 R. R. 634 (3 T. R. 51).

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opinion as he did at the time of the judgment. The doctrine laid down in that case is in practice and experience most dangerous. I state that upon my own experience; and if the action is to be maintained in opposition to the positive denial of the defendant against the stout assertion of a single witness, where the least deviation in the account of the conversation varies the whole, it will become necessary, in order to protect men from the consequences, that the Statute of Frauds should be applied to that case. Suppose, a man asked, whether a third person may be trusted, answers, "You may trust him; and if he does not pay you, I will." Upon that the plaintiff cannot recover; because it is a verbal undertaking for the debt of another. But if he does not undertake, but simply answers, "You may trust him: he is a very honest man, and worthy of trust," &c. then an action will lie. Whether it is fit the law should remain with such distinctions, it is not for me to determine. Upon the case of *Pasley v. Freeman*, I have always said, when I was Chief Justice, that I so far doubted the principles of it, as to make it not unfit to offer, as I always did, to the counsel, that a special verdict should be taken: but that offer was so uniformly rejected, that I suppose I was in some error upon this subject. I could therefore only point out to the jury the danger of finding verdicts upon such principles; and I succeeded in impressing them with a sense of that danger so far, that the plaintiffs in such actions very seldom obtained verdicts. It appears to me a very extraordinary state of the law, that if the plaintiff in the case of *Pasley v. Freeman* had come into equity, insisting, that the defendant should make good the consequence of his representation, and the defendant positively denied, that he had made that representation, and only one witness was produced to prove it, the court of equity would give the defendant so much protection, that they would refuse the relief; and yet upon the very same circumstances the law would enable the plaintiff to *recover. Whether that is following equity, or not quite outstripping equity, is not a question for discussion now: but it leads to the absolute necessity of affording protection by a statute, requiring, that these undertakings shall be in writing.†

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† See 9 Geo. IV. c. 14, s. 6, which somewhat tardily carried out Lord Eldon's suggestion.—F. P.

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With regard to the circumstances of this case, this is an amended bill; and I do not know, but I rather suspect from the frame of the bill and the nature of the answer, that this was an after-thought: but still the plaintiff must have the relief, if it is founded. The bill at first must have gone upon the ground of fraud in the wife. Her answer removes all possibility of charging her estate with the mortgage; and then the bill suggesting pretences by Bicknell, that he was a stranger to the application of Stansell to the plaintiff to lend him the money, and did not know, what use Stansell intended to make of the deeds, charged, that Bicknell delivered the deeds for the express purpose of enabling Stansell to represent himself to the plaintiff to be the owner of the premises; and that Bicknell has admitted or declared upon different occasions and in the hearing of different persons, that Stansell at the time of the application informed him, that he wanted them for the purpose of obtaining credit; and made such declaration or admission in the presence of the plaintiff and Hawkins, the solicitor, and the defendant Taylor; and insists, that Bicknell having enabled Stansell to practise such fraud he ought to pay the plaintiff whatever sum she may lose by those means. If the purpose imputed by this charge was proved, it would be sufficient to maintain the bill.

Next, the admission, that he said he wanted them to enable him to obtain credit from some person or persons, admits a variety of constructions. First, if he was about to borrow the money, the person, to whom he applied, might have consented to lend it; if satisfied, that the estate was in his family. On the other hand it might be, that he wanted by means of the title-deeds to obtain credit by representing himself as owner of the premises. It is necessary therefore to consider very accurately what it must be taken to mean; regard being had to what the defendant says in his answer; who in this Court has the benefit of his own conscience, and to what it proved in evidence. Having in his first answer stated, that he knew nothing of the purpose to make a *mortgage, by his second answer he positively denies, that the delivery to Stansell was to enable him to obtain a mortgage. The result of the answer is, that he knew Stansell was covered with insolvency; which was

notorious in Bristol; and that Stansell suggested to him, that for the purpose of his trade he could obtain a credit in the way of his trade, if he could shew, that he and his wife had a title to that property; and for that reason Bicknell parted with the deeds. It is to be remembered, he retained the settlement: but I take the fact now to be, that the counterpart was in the hands of the husband or the wife.† Therefore he delivered the deeds to those, who had the settlement; and retained that part, I presume, as evidence of his claim to have back the title-deeds. It is not the case therefore of a person delivering them to another; who had not in his hands, that, which would shew the real nature of the title; but to one, who acting honestly would produce that settlement. It was to a certain degree trusting to his honesty as to that: but it varies the state of the case; where a party is to be charged upon the ground of fraud, or negligence so gross as to be evidence of an intention of fraud. If Hawkins was living, he might have given an account, that would have removed all doubt: but it might have been favourable to the defendant; and if there is a doubt upon the result, that is a circumstance the Court must deal with as well as they can. I am a little struck with the circumstance, first, that in the mortgage of the freehold estate the wife was not made a party with regard to her dower; also, with the peculiarity, that the person lending the money by Hawkins, the attorney, bargains for the possession of the estate; to the intent, that by perception of the rents and profits not only the interest, but the principal also, should be paid; and when the state of the title is recollected, that upon the wife's death the property would go to the children, a strong ground of prudence appears for taking the mortgage in that way. If so, the defendant has a right to the benefit of that circumstance, which would naturally have occurred in the dealing of persons, providing for repayment by the application of a partial interest; which proving ineffectual, the money itself would be in danger. These circumstances must not be forgot.

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Then Taylor, a trustee, entirely without interest, and therefore though a defendant, examined as a witness, is the only

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† It was said at the Bar, that upon inquiry the fact turned out to be so.

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witness, upon whose testimony the decree is to be made. The bill being amended, and this being a case, in which the Court ought to be particularly sure of the ground, on which it decides upon a fact equivocal, or a declaration, more or less according to the recollection of the precise terms by the witness, it is not unfair to observe, that probably before the amendment the plaintiff must have collected the account of it from Taylor; if he was the only person, from whom she could have got the account; and the bill was then amended, in order to introduce the allegation as to Stansell's representation to Bicknell. Taylor does not recollect half as much in his answer as in his evidence; and that is a very material circumstance, when the defendant is to be charged upon this ground, that more credit is to be given to the defendant's denial than to the assertion of one witness. It ought to be with reasonable certainty put in issue by the allegations of the bill. Taylor's account is not necessarily inconsistent, I do not say it is necessarily consistent, with Bicknell's: but it must be necessarily inconsistent, and more credible than the denial by the answer, before the decree can be made. He says, the purpose, as represented by Bicknell, was to shew the deeds to some person, who would let him have credit in the way of his trade; and in the same conversation they were to be brought back in an hour. That negatives the very idea, that the estate was to be pledged. That mode of representing the conversation, instead of opposing, confirms Bicknell's answer. Upon his answer therefore and Taylor's evidence there is not that sort of contradiction, that entitles the plaintiff to a decree against Bicknell on the ground of fraud. The circumstance of Taylor's examination shews the danger; for Bicknell had no opportunity of answering the farther evidence of express charge. It is very extraordinary to say, this Court will not act upon the evidence of one witness contradicting the answer, and yet it will act upon that evidence, in order to charge the defendant in a circumstance, to which he has had no opportunity of stating himself. That therefore could only be a ground for inquiry.

But, even taking the whole of Taylor's evidence, I still entertain great doubt, whether upon such a transaction a party should be charged personally; for even upon that it amounts to no

more *than that a trustee delivers the deeds into the hands of a party, who has the settlement. I do not say, it is not negligence; but it is too dangerous upon such loose evidence to hold, that it is that gross negligence, that amounts to evidence of fraud. The conversation, that the repayment was to be by the application of two years' rents, does not look like the suggestion of a mortgage; and it is remarkable, that there is a provision for repayment out of the rents. The question therefore will be, whether Taylor's evidence is to be taken, as constituting evidence rising as high as fraud; so as to support a personal decree against Bicknell; and to the extent of excluding Bicknell from an inquiry, and an opportunity of giving his own account; and upon the principle of this Court I think it cannot.

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I conceive, it is now very well settled, that the doctrine of Mr. Justice BULLER, that I have just stated, is founded upon error. It would be an idle waste of time to go through all the cases; which will be found in *Plumb v. Fluit*,† and admirably well stated by Mr. *Fonblanque*.‡ The doctrine at last is, that the mere circumstance of parting with the title-deeds, unless there is fraud, concealment, or some such purpose or some concurrence in such purpose, or that gross negligence, that amounts to evidence of a fraudulent intention, is not of itself a sufficient ground to postpone the first mortgagee. I agree with Chief Justice EYRE, I should have been glad to have found the rule established in the Court the other way. At the same time allowance must be made for the cases put by Mr. *Fonblanque* of joint-tenants and tenants in common; cases of necessary exception: all cannot have the deeds. Therefore, if the rule could be pressed to the extent, to which Mr. Justice BULLER carried it, those cases must be excepted, in which from the nature of the title the deeds may be honestly out of the possession. With that exception such a rule would avoid a great deal of fraud in mortgage titles; upon which this observation arises; that no man can tell, when he is perfectly secure. But there is not such a rule.

Then, as to concealment; as the case of persons standing by, as witnesses to deeds: if it is to be taken as a fact, that the

† 3 R. R. 605; 2 Anst. 432.

‡ 1 Fonb. Treat. Eq. 262, note n.

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witness knows the contents of the instrument, to which he is a witness; *the engrossment of the mortgage by a person entitled under a prior entail; no recovery having been suffered: all these cases, either of positive representation contrary to the truth, or concealment of what ought to have been represented, are intelligible; but it is not to be denied, that, where there has been mere negligence, though it may have very mischievous consequences, the Court has not charged the party, unless it has been so gross as to amount to evidence of fraud. The case of the *Thatched House Tavern* was very strong. The mortgagor, desiring to have the deeds, represented to the mortgagee, that he was about to make additional buildings; which would improve his security. The purpose of delivering the deeds was innocent: but it gave the other the complete power of executing the fraudulent purpose. Having got the title-deeds he makes a mortgage; and then contrived to get the lease back from the second mortgagee and restored it to the first. But the negligence did not rest upon that only. The mortgagor applied a second time to the first mortgagee, and under another pretence got the deeds again; which enabled him a second time to cheat third persons: and he made a third mortgage. The circumstance of his parting with them again was strong. Then the question arose upon these mortgages; whether the first should not be postponed to the second and third: but the Court thought, there must be some concurrence in a fraudulent purpose; and the purpose held out disclosed nothing of fraud. If negligence alone was sufficient, it ought to have had the effect in that case: but the Court said, the first mortgagee had done nothing unconscientious; and did not conceive themselves entitled to relieve the subsequent mortgagees. If he had not got back the lease again, perhaps by consequence he would have been postponed; but not upon the ground, that he had parted with it, but upon *Head v. Egerton*; † for it would have been impossible to have taken it from the second mortgagee; and notwithstanding any decree, that may be made, the case is open to these plaintiffs, if they can make any thing of it upon that.

If then the cases go to this only, that there must be positive

† 3 P. Wms. 279.

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fraud or concealment, or negligence so gross as to amount to fraud, is there in this case evidence, resting upon that high degree of probability, upon which the Court, guided by its conscience must *act, that this trustee had a fraudulent purpose: if not, is there negligence so gross as to amount to constructive fraud; as Chief Justice EYRE expresses it in *Plumb v. Flutt*; such evidence of fraud, that he shall not be heard in a court of justice to say, there was not fraud? I agree, if the intention is fraudulent in any respect, though not pointing exactly to the object accomplished, yet he will be bound. That was Lord THURLOW's doctrine in *Beckett v. Cordley*; † and was the doctrine in much older cases; as, where a bond was given upon a marriage; and the marriage with that person went off, and took place with another: the party could not say, the bond was not intended as to the marriage, which took effect. The Court would say, it was a fraudulent act; and though not precisely that intended by the parties, yet a use was made of it, to which the delivery of that bond naturally led; and therefore he should be bound. If therefore in this case I could be perfectly satisfied, that the intention was, according to the allegations in this bill, taken altogether, that he might represent himself as entitled to credit as owner of the premises, and obtain credit in his trade by representing himself as owner of the premises, and that Bicknell acceded to that purpose, so understood, I should be strongly disposed to hold Bicknell liable to the extent, in which Stansell's holding himself out as owner had involved a third party. But I cannot say, it is clear, that at the time of the application to Bicknell Stansell had this design. It is not clear, that it did not occur to him, after he had obtained possession of the deeds; and it is far from being clear upon the evidence, that Bicknell knew, that such was the intention; for the transaction was not unnatural. I cannot expect them to reason upon the niceties of title. When we consider the title of the wife, as her separate interest, it is an argument: but it would be very hard to press it as an evidence of fraud; and a fraud, of the nature of which such a trustee must be sensible: so that I must collect a fraudulent purpose. I hesitate also in giving

† See 1 Glyn & Jam. 243.

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Taylor credit for his evidence, carried in the depositions so much farther than the answer; and the bill containing no allegation to give Bicknell the benefit of his answer; with the conversation, that the money was to be repaid by two years' rents; and the circumstance, that in the security the rents are really devoted to the principal as well as the interest. Then, if there is no express declaration or concealment by the trustee, it results to this; whether under all the circumstances and the *answer and evidence together the mere parting with the deeds for the purpose stated and on condition to return them in a few hours to a man, having the settlement in his possession, is a circumstance of so gross negligence, and because it may possibly lead to mischief, that it is conclusive evidence of fraud. I am very sorry, the Court acts upon a rule so loose and dangerous to property: but if such is the rule, I cannot under all the circumstances upon this state of the record charge Bicknell with this sum of 300*l*.

The only remaining question is, whether there ought to be farther inquiry upon the subject. That may be by dismissing this bill without prejudice to an action; and probably in that way the plaintiffs may meet with more favourable equity than I should give them by directing an issue; for I should not direct that without giving Bicknell the same benefit, that might result from the honesty or dishonesty of his conscience, as he would have in equity. The issue ought to be upon this question; whether the deeds were fraudulently delivered to enable Stansell to obtain money of other persons; for that general direction would be consistent with the principle I adopt; that, if the intention was fraudulent, it is not material, whether it was to obtain money of other persons in the way of his trade by representing himself as owner of the premises, or by a mortgage. I am not so perfectly satisfied, that Bicknell meant well, as to refuse that issue, if the plaintiffs choose to take it: but unless I am satisfied by a jury, that there was such fraudulent intent, I shall dismiss the bill without costs; for there is negligence enough for me to say, he shall not have his costs.

The case of *Arnot v. Biscoe*,† which was relied upon, is very

† 1 Ves. Sen. 95.

distinguishable. The defendant declared the title to be in every respect good: a fact very materially discriminating that case from this; for Lord HARDWICKE very properly puts the attorney in the situation of the vendor himself; and then the plaintiff's money was advanced upon the express declaration of that attorney, that the title was clear. Lord HARDWICKE lays down the principle of equity, that, wherever the buyer is drawn in by misrepresentation or concealment of a material fact or circumstance, so as to be injured thereby, and that done with intention and fraud, he is entitled to satisfaction here. In that passage and others Lord HARDWICKE *lays so much stress upon the title to relief here, that I think it very questionable, whether he foresaw the relief, that has been given upon the principle these cases furnish so liberally at law; and there seems something like a declaration by him, that if a first mortgagee does not take the title-deeds, he shall be postponed. That appears to have been the old notion of the Court.

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The decree was made against Stansell for the sale of his interest in the estate, and payment of the deficiency: as against Bicknell the bill to be dismissed without costs; unless the plaintiff would take the issue; in which case Bicknell was to be examined; and if they chose to have the bill dismissed, it was to be without prejudice to an action.

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(6 Ves. 226—231.)

No tacking against creditors or assignees for valuable consideration.

Trustee not charged with a loss by the failure of the banker to the agent; in whose hands the money was deposited pending a transaction for the change of a trustee.

Consideration of what is necessary to constitute an effectual appropriation of property by a trustee to make good a loss arising out of a breach of trust committed by him.

THE bill was filed by creditors of William Wood, for the purpose of obtaining the benefit of a deed, conveying all his estate

† See (as to tacking) *Talbot v. Frere* (1878) 9 Ch. D. 568; (as to appropriation) *Middleton v. Pollock* (1876) 2 Ch. D. 104, 45 L. J. Ch. 293.

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to Adams and Claxton, two of his creditors, in trust for the benefit of his creditors. The accounts were directed; and the Master by his report stated, that the late defendant William Claxton under an assignment made to him by the testator Wood of a policy of insurance upon his life for 1,386*l.* 10*s.* for securing 1,000*l.* advanced by Claxton, received the money from the insurance office upon the death of Wood; and he claimed to retain out of the surplus 319*l.* 10*s.* 7*d.* for principal and interest due upon a subsequent promissory note for 300*l.* payable a year after date. That question was submitted by the Master to the Court.

Another question arose upon the following circumstances, appearing on the report. Adams desiring to be discharged from the trust, pending the transaction for the change of trustees the agent for the trust in April, 1796, received three payments on account of the trust, to the amount of 252*l.* 15*s.* 8*d.*; which sum was deposited with Nightingale, the agent's banker, till another trustee should be appointed, or some banker should be agreed on to receive the trust money. This money was paid in in the agent's name as a temporary matter only. Nightingale stopped payment. The deed contained no covenant or condition for depositing the money received under the trust in any bank, until it should be distributed. Wood died a few days after the execution of the deed. The question was, whether the trustee was personally liable to that loss.

The third question arose upon the following facts. The testator Wood effected an insurance for 1,000*l.* upon his own life on the 6th of January, 1790. Upon that policy the following indorsement appeared in the hand-writing of the testator Wood:

"No. 9964. 6 January, 1790. Policy upon the life of William Wood for 1,000*l.* annual premium 30*l.* 13*s.* payable 5th January. R. B."

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The report stated, that it was alleged before the Master, that the two last letters of that indorsement were intended to signify the initial letters of the name of Richard Boyfield; under whose will the testator Wood was the principal acting, as well as surviving, executor; and to whose estate he had as executor become considerably indebted. The policy was discovered among Wood's

papers, delivered up by him in February, 1796, upon his making the assignment of his effects to trustees for his creditors; and annexed to the policy was found the following paper, all in Wood's hand-writing: "The annexed policy of insurance from the Equitable Insurance Office, Blackfriars Bridge, for securing to my executors, administrators, or assigns, the payment of 1,000*l.* upon the event of my death, is hereby agreed and intended by me to be vested in Mary Woodyear, of Camberwell, Surrey, widow; in trust to lay out the same and apply the principal together with the produce of 2,500*l.* 3 per cent. Consols, now in the bank in my name but bought by me as executor for the use and benefit of the Boyfield family, and together with the rents of the late Richard Boyfield's estate for the benefit of Mrs. Boyfield and said Mrs. Woodyear for their respective lives and then to be applied for the use of Mary Woodyear's child or children according to the will of the said Richard Boyfield; and I do further agree, that the said Mary Woodyear shall have a lien upon the said policy of assurance for the said sum of one thousand pounds to be applied for the purposes accordingly; and which policy so hereby assigned or agreed or intended so to be vested in the said Mary Woodyear as aforesaid is No. 9964 and bears date the 6th day of January, 1790: as witness my hand this 18th day of April, 1790.

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Upon the 25th of January, 1797, Claxton received the money in respect of that policy: which he invested in stock; and he transferred the stock to the Accountant-General; and invested the dividends. The Master stated, that he conceived, the testator Wood did by the said paper so appropriate the benefit of the policy, that the persons interested under the will of Boyfield have a right to the benefit of the monies arising therefrom.

The cause came on for farther directions.

Mr. Romilly and *Mr. Steele*, for the defendant Claxton, the personal representative of the trustee, upon the second question insisted, the trustee was not to be charged with the money paid into the bank of Nightingale: the trustee having dealt with this

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money, till the appointment of another trustee, just as he would with his own property, and for the benefit of the parties. *Knight v. Lord Plymouth*,† *Ex parte Belchier*.‡

Mr. Piggott, Mr. Richards, and Mr. Hart, for the plaintiffs, upon an intimation from the MASTER OF THE ROLLS, that it would be impossible to charge the trustee, gave up that point.

Upon the third question they contended, that under these circumstances Wood could not give one creditor this preference. Without delivery of the instrument it could not be an assignment. He never mentions it; keeps it for two or three years, until, executing the deed of trust, he delivers it with his other papers to the trustee. As against creditors it cannot possibly prevail. A lien springs from contract. Here the persons, who claim this lien, knew nothing of it.

Mr. Sutton and Mr. Raithby, for the personal representatives of Boyfield, insisted, that a preference might be given, if not with a fraudulent view, or in contemplation of bankruptcy; and that this was an appropriation: the money being marked out.

The MASTER OF THE ROLLS asked, how it was to operate; being admitted not to be an assignment. He must give them or some one on their behalf power over it. If anything, it seemed to be of a legatory nature, to take effect after his death.

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Upon the first question, the claim of the representative of Claxton to retain beyond the 1,000*l.* so much of the money as will pay him the subsequent debt upon a note of hand, under the circumstances I am of opinion, that claim cannot *be allowed. At the time, when the assignment was made to the trustees for the benefit of Wood's creditors, Claxton had an assignment of this policy to secure the sum of 1,000*l.* and no more. By that assignment every thing, which it was competent to Wood to assign, passed from him to his trustee; and consequently the equity of redemption of the policy so pledged. Claxton had not

† 3 Atk. 480.

‡ Amb. 218.

at that time received the money upon the policy. That might have raised a different consideration; if he had the money in his hands: but he was merely a mortgagee for 1,000*l*. It is clearly settled, that, in the case of a mortgage the right to attach a subsequent debt to the mortgage cannot be made available against an assignee of the equity of redemption. That has been repeatedly determined in the case of real estate. *Troughton v. Troughton*,† the *anonymous* case,‡ 2 Ves. Sen. 662. *Heams v. Bance*§ is a still stronger case; where a trust for the benefit of creditors was raised by the will of the mortgagor.

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With respect to pledges of personal estate, *Demainbray v. Metcalfe*|| arose upon a pledge of jewels. The party afterwards borrowed other sums upon a general account; and he insisted upon his right of redeeming the jewels upon payment of the first sum only. It was held, that he must pay the whole: but it was admitted, that if there had been bond creditors, or in case of a bankruptcy, the pledge could have been retained only for the first sum; and the creditor in the case of a bankruptcy must have come in under the commission for the remainder. In *Vanderzee v. Willis*¶ there was an assignment of bonds to secure 1,000*l*. borrowed by the testator from his bankers. At that time he was indebted to them in more; and he continued indebted in more to his death. His executrix filed a bill to redeem. The bankers insisted upon the right to tack; and so standing the case, it would, I think, have been held, that they must be paid the whole: but it was insisted, that a bill had been filed by creditors, and a decree made. Lord THURLOW seems to have held, that *would have made it a question with creditors, not with the executrix simply; stating the principle that, where the equity has passed to an assignee, you cannot insist upon retaining against the assignee. In this case the equity of redemption passed by the assignment for the benefit of Wood's creditors; and therefore Claxton cannot insist on paying himself the additional sum.

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† 1 Ves. sen. 86.

§ 3 Atk. 630.

‡ The name of that case is *Jackson v. Langford*, July 21st, 1755, Reg. Lib. A. 1754.

|| Pre. Ch. 419; 2 Vern. 691.

¶ 3 Br. C. O. 21.

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The other question arises in consequence of a reference to the Master to inquire, to whom a policy of insurance upon Wood's life, or the money, that may be received thereon, belongs. The report states all the circumstances; and concludes, that the Master conceives, the testator Wood did by that paper writing so appropriate the benefit of the policy, that the persons interested under the will of Boyfield have a right to the benefit of the money. No exception is taken to the report: but the whole matter appears upon the face of it; and therefore it is contended, that it is open to inquire, whether the Master's conclusion is right; and I apprehend, it is so open. The date of this paper must be false; for Boyfield was not at that time dead. The report does not state, whether Wood at the time he made this writing was or was not indebted to the persons, for whose benefit he professes to make this species of appropriation: but it turns out, and appears by the schedule to the report, that the representatives of Boyfield were creditors of Wood to the extent of 4,000*l*. It is contended, that this was such an appropriation as gives these persons, the representatives of Boyfield, a lien against the creditors. It is admitted, this policy, when first made, was entirely Wood's own property. It could not have been procured in trust for them; for then Boyfield was not dead; and they had not become his representatives. Being Wood's own property, how did it cease to be so? Has it been transferred? How has any other person acquired a lien; so as to prevent the effect of any general or special assignment? This paper is quite insufficient for that purpose. I do not very well know, what is meant by an appropriation of the policy to a debt: how a man, sitting in his closet, could by writing a paper, declaring, that certain bonds, or part of his stock, should be applied to a particular debt, appropriate that property. That is not an assignment; a lien, giving that creditor a right to a specific application in his favour, to the prejudice of creditors: who might in any other way have obtained a right to *the general effects. If he had given an order upon a particular fund to a creditor, that would have been an appropriation of so much of that fund to the debt; and the creditor would have a right upon that. But in this case there was no communication

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between the creditor and the debtor; there is nothing but a mere piece of paper. It is not even written upon the policy, but a detached slip of paper; which he pins to it; keeping it in his own possession; and not even communicating the fact, that he had written it. He might have destroyed, or detached, it. He keeps it some years; and at last delivers it up to the trustees, to whom he had assigned the whole of his effects for the benefit of his creditors. But there is no statement upon the paper, that it is in satisfaction of any debt; or, that he owes any debt. The words, as far as they relate to the policy are purely words of gift. Perhaps they might have operated as legatory words; as a bequest after his death. There is no mention, that it is in satisfaction of any debt, or that any debt was due. I only collect from another part of the paper, that there was stock, standing in his name, purchased with the assets of Boyfield: but that goes only to that stock. I do not collect, that any satisfaction of that debt was intended. It is said, that though this is an undelivered instrument, a kind of contract with himself, and in his own power, yet it was all he could do, all the delivery, that could take place; for he had embezzled part of the assets; and this was meant as a satisfaction for that embezzlement: but it is not true, that this was all he could have done. He might have assigned it immediately to a trustee upon the trusts of Boyfield's will; and he professes to intend to do that. This does not purport to be a final instrument. But it rests as mere declaration of intention; which can in my apprehension produce no effect whatsoever.

Therefore upon this question the Master has drawn a wrong conclusion; and this policy must be considered as constituting part of the general effects for the benefit of the creditors. Upon the only remaining question declare, that the defendant Claxton is not to be charged with the money deposited in Nightingale's bank.

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(6 Vesey, 232—238.)

Construction of a covenant for renewal under the like covenants, &c. ; that it was not for perpetual renewal: the Courts leaning against that construction, unless clearly intended.

Legal instruments not to be construed by the acts of the parties.

By indentures of lease, dated the 12th of November, 1759, Lord Foley granted certain premises to Robert Moore, his executors, administrators, and assigns, for the lives of his three children, Robert, James, and Mary, Moore, and of the longest liver of them ; in trust for them successively, at the yearly rent of 60*l.* 3*s.* 4*d.* ; and also paying at the decease of every of them, the said Robert, James, and Mary, 40*l.* as a heriot.

The lease contained a covenant, that, when anyone of them, the said Robert, James, and Mary, Moore, should happen to die, then the survivors of them, the said Robert, James, and Mary, Moore, their heirs and assigns, should within one year next after the death of such one of Robert, James, and Mary, Moore, as should first happen to die, pay to Lord Foley, his heirs or assigns, the sum of 42*l.* 6*s.* ; and that Lord Foley should upon receipt of that sum and request and surrendering the said grant at the cost of Robert Moore, the elder, his heirs or assigns, grant unto the survivors of them the said Robert, James, and Mary, Moore, and to such other person as the said survivors should nominate, the premises ; to hold to the survivors of them, the said Robert, James, and Mary, Moore, and such other person as the said survivors should nominate, for and during the natural lives of such two of them, the said Robert, James, and Mary, Moore, as should happen to survive, and for the life of such third person as the said survivors of them, the said Robert, James, and Mary, Moore, should nominate ; and for the life of the longest liver of them, for their natural and respective lives successively, and not jointly, at, for, and under the like rent, covenants and conditions, as were therein contained and reserved ; and moreover it was mutually granted and agreed, that in such grant to be made by Lord Foley, his heirs or assigns, unto

† *Swinburne v. Milburn* (1884) 9 Ap. Ca. 844, 850, 54 L. J. Q. B. 8.

Robert Moore, the elder, his heirs or assigns (in trust, as afore-said) it should be covenanted and agreed, that when and as often as any one of the said three persons, for whose lives the said grant should be made, should happen to die, then the *survivors of them should within one year after the death of such one person pay to Lord Foley, his heirs or assigns, the sum of 42*l.* 6*s.*; and surrender the grant then in being; and Lord Foley, his heirs and assigns, should upon the payment of the said money and surrendering up of such grant at the request and charges of the said survivors of such lessees execute another grant unto the said survivors of such lessees for and during the lives of such two of the said persons as should be then living and for the life of such other person as the said survivors of the said lessees should nominate under the like rent, covenants, provisoes, and conditions as were therein contained: provided, that, when any two of such persons, for whose lives such grant should happen to be made, should happen to die within one year, and before such new grant ought to be made according to the true meaning of the said lease, then the survivor of such lessees should within one year next after the death of such second person of the said three persons, for whose lives such grant should be made, pay to Lord Foley, his heirs or assigns, the sum of 102*l.* 6*s.*; and that Lord Folġy, his heirs or assigns, should upon receipt of the said money and surrendering up of the grant then in being at the request and charges of such surviving lessee execute another grant unto such surviving lessee for the lives of such surviving lessee and of such two other persons as such surviving lessee should nominate, at, for, and under, the like rents, covenants, and conditions, as were therein mentioned and contained: Provided, that, if at any time Robert Moore, the elder, his heirs or assigns, should upon the death of any one or more of them, the said Robert, James, and Mary Moore neglect or refuse to pay to Lord Foley, his heirs or assigns, the said respective sums, or to surrender the grant then in being, and accept a new grant, it might be lawful for Lord Foley, his heirs and assigns, to enter, and hold, until he and they should have received the said several and respective sums with interest; and then he and they should make such grants, &c. as he and they ought to have made, if the

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money had been paid at the time : Provided, that, if the heir of Lord Foley should be within age at the time, when the new grant should be made, no entry should take place till a month after he should have attained his age.

[*234]. Lord Foley died in 1766. Robert Moore, the younger, one of the lives, died upon the 7th of July, 1793. Upon his decease James Moore applied for a renewal according to the covenants to *Andrew Foley, devisee in trust of the last Thomas, Lord Foley. No renewal could then be made: the present Lord Foley being under twenty-one; but an Act of Parliament was passed enabling Andrew Foley to grant and renew leases. In April, 1796, before any renewal Mary Moore, another of the lives, died. Upon her death James Moore applied to have two new lives added; offering to pay two fines of 42*l.* 6*s.* each. The parties differing as to the proper covenants to be inserted in the new lease, the bill was filed by James Moore; and a decree was made; referring it to the Master to settle a lease.

An exception was taken by the defendant to the Master's report, approving a lease containing a covenant for perpetual renewal: viz.

When and as often as any one of the said three persons, for whose lives the said grant shall be made, shall die, Lord Foley, his heirs or assigns, shall within one year upon payment of 42*l.* 6*s.* and surrender of the grant then in being execute another grant to James Moore, his heirs or assigns, for the lives of the two survivors and such other person as James Moore, his heirs or assigns, shall nominate, under the like rents, covenants, provisoes, and conditions, as are herein contained; and in case two such persons die within one year, before such grant, then within one year after the death of the second of the three persons, for whose lives the said grant shall be made, Lord Foley, &c. shall on payment of 102*l.* 6*s.* and surrender, execute a new grant for the lives of the survivor and such two other persons, as should be nominated, at, for, and under, the like rents, covenants, and conditions, &c.

Mr. Lloyd and *Mr. Lewis* in support of the exception, insisted, the rule is now established, that a general covenant for

renewal, subject to the like covenants, &c. is exclusive of the general covenant for renewal: and the Court will not without the strongest words insert so unreasonable a covenant. They relied on *Tritton v. Foote*† and the note there, *Russell v. Darwin*.‡

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Mr. Richards and *Mr. Cooke*, for the report :

These cases do not apply to this. The general principle until the decision of *Tritton v. Foote* and the case before Lord Camden was to make these leases perpetually renewable. But there are two covenants in this grant: which distinguish this case. The second covenant puts it out of all doubt. The covenant now proposed is the very covenant, for which they have stipulated. This lease has been always considered as perpetually renewable from the very first grant; which was in 1662; and several instances have been found.

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Mr. Lloyd, in reply :

The practice is not material: this construction upon these covenants being very modern. Upon what ground were these cases determined, except this; that such a covenant is unreasonable? The covenant for renewal was included under the general words in those cases. It is very difficult to collect the intention from these words; and the Court will require the clearest intention for this purpose; which is in effect giving away the estate.

THE MASTER OF THE ROLLS :

In the first part of this lease nothing is stated but the premises, the lives, for which they are granted, and the rent payable. If it rested there, the lease would be at an end, when those lives dropped. Then comes the first provision for renewal. If it rested upon that, it would be a covenant for renewal upon the dropping of the first life only; and the moment they had got a new life in the place of that one that covenant would have been completely satisfied; unless they could insist, that the words "under the like rent, covenants and conditions," were meant to include that covenant for renewal; and that in the second lease

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† 2 Br. C. C. 636.

‡ 2 Br. C. C. 639, note.

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a farther covenant for renewal should be inserted. But it does not stop there. They go on to make this stipulation with regard to the covenant to be inserted in that new lease, to supply the first life, that should drop; that "in such grant," (that is the grant to fill up a new life in the room of that first dropping) it should be covenanted and agreed, that when and as often as any one of the said three persons, for whose lives the said grant should be made, should happen to die, another grant should be made for the lives of the survivors and such other person as should *be nominated, under the like rent, covenants, provisoes and conditions, as were therein contained. The mode adopted is not by providing directly, how long these renewals should go on, but by a covenant with regard to the renewal, to be introduced into the second lease. Then follows the provision for the case of two of them dying within a year.

This is all, that relates to the farther renewal. The first agreement is, that this stipulation shall be inserted in such grant; that is, the grant, that was to be made upon the dropping of the first life; and consequently the introduction of this stipulation into that would have the effect of entitling the lessee to a renewal upon the death of everyone of the three persons comprised in the second grant. I lay out of consideration the first lease. The second will become in the nature of an original lease; when there is a grant for three lives, with this stipulation to be introduced into it; that when anyone of the three dies, a new lease shall be granted for the lives of the survivors and a new life. Does that carry it further than the lives of the three persons; whose names shall be contained in that second grant? I am of opinion it does not. There is no stipulation for any ulterior event; and there are no general words. The words are not "from time to time" as in *Furnival v. Crew*; † upon which words Lord HARDWICKE laid great stress; as amounting to an obligation to fill up lives upon the dropping at any time: but this covenant extends no farther than to introduce this very stipulation into this one new grant; and as to the lives only, to be contained in that grant. But the plaintiff wants, not to have it introduced into this first grant, after the original one, but to

† 3 Atk. 83.

have a stipulation for the same proviso in the subsequent grant; and if it is necessary to introduce it in the next, it must be *in infinitum*, upon this principle; that I can find out in the first a clear intention for a perpetual renewal. Otherwise I cannot carry it farther than the dropping of the three lives introduced into the second grant. So the plaintiff upon the whole would have the benefit of four renewals: one under the covenant in the original grant: then having got his three lives again he has that stipulation, when any one of them die. There are no general words of any kind. They stop short at that clause. *The covenant is specific, to introduce it into such grant only. It is identified and ascertained by what is stipulated immediately before, that it is the grant upon the dropping of the first life; and farther, that it extends to the three lives to be filled up, and no others. There is not a word expressing, that it was the intention of the parties, that it should be renewable for ever. I am perfectly at a loss to discover a ground for that intention; as they have expressed it. Possibly their intention was for a perpetual renewal: but it is not expressed: nor are there any general words from which such intention can be collected.

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I agree with the late MASTER OF THE ROLLS in *Baynham v. Guy's Hospital*; † who says, ‡ “I collect therefore from these cases this; that the Courts, in England at least, lean against construing a covenant to be for a perpetual renewal; unless it is perfectly clear, that the covenant does mean it. *Furnival v. Crew*, § which is relied on in *Cooke v. Booth*, || had clear words for a perpetual renewal; which made it impossible to construe it otherwise.”

There being no clear words in this case, nor any words relative to perpetual renewal, but the parties themselves having limited it, the question is, whether the proviso, that the renewal shall be under the same rents, covenants, and conditions as the first lease shall in the absence of more positive stipulation amount to a perpetual renewal. Upon *Tritton v. Foote* and *Russell v. Darwin* I am bound to hold, that a covenant for renewal under the same covenants does not include the covenant to renew, but

† 3 R. R. 96 (3 Ves. 295).

‡ 3 R. R. 100 (3 Ves. 398).

§ 3 Atk. 83.

|| Cowp. 819.

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that it means only a second lease, not a perpetuity of leases. As to *Cooke v. Booth*, that was not determined upon the ground, that a covenant for renewal did operate inclusively of that covenant: but Lord MANSFIELD goes almost entirely upon the conduct of the parties: repeated renewals having been made. With regard to that mode of construing an instrument I refer to *Baynham v. Guy's Hospital*; where the MASTER OF THE ROLLS strongly protests against it. I cannot hold, that it is perfectly clear, this covenant means a perpetual renewal: on the contrary the parties, if they meant to rest upon anything as a covenant for perpetual renewal, must *have rested upon the words "under the like rents, covenants, and conditions;" and probably they did; for the original lease was in 1759; at which period these determinations had not taken place; and it might have occurred to those, who prepared the lease, that it would be sufficient. For the reasons I have given, even if the acts of the parties, which are said to have been upon this foundation of a perpetual renewal, were in evidence before me, I should not act upon them; for certainly that is not a very legal mode of construction; that a man having done an act without being bound to do it, or from mistake, shall therefore be bound for ever without the power of retracting.

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I think, this plaintiff is entitled to word one of his covenants a little differently from what he would, if he had not conceived he had this right. He is entitled to have a renewal as often as any of the lives drop; not merely the first. He is entitled to have the two new lives put in, and to have a renewal upon everyone of them; not merely upon the first; as he has now shaped his covenant.

The exception was allowed.

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(6 Vesey, 239—250)

1801.

*July 2, 8.**Rolls Court.*
GRANT, M.R.

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The word “when” in a will, alone and unqualified, is conditional: but it may be controlled by expressions and circumstances: so as to postpone payment or possession only, and not the vesting: as, where the interest of the legacy in the interval was directed to be laid out at the discretion of the executors for the benefit of the legatees, it vested immediately.

Distinction between a legacy at twenty-one and payable at twenty-one, borrowed from the Civil Law but disapproved.

JAMES GRAHAM by his will, dated the 18th of March, 1771, gave to Mary Hanson, Thomas Hanson, and Rebecca Graham Hanson, the three children of his daughter Mary Hanson, 500*l.* a-piece of 4 per-cent. Consolidated Bank Annuities, when they should respectively attain their ages of twenty-one years or day or days of marriage, which should first happen, provided, it was with such consent of his executors and trustees, as therein mentioned; and he declared, his mind and will was, that the interest of said several 500*l.* amounting in the whole to 1,500*l.* 4 per cent. Consolidated Bank Annuities, so given to his three grand-children, as aforesaid, as often as the same should become due and payable, should be laid out at the discretion of his executors and trustees in such manner as they or the survivor of them should think proper for the benefit of his said grand-children, till they should attain their respective ages of twenty-one years or day or days of marriage, and to and for no other use, intent, or purpose, whatsoever; and after devising his real and leasehold estates, and giving two legacies of 10*l.* each, he gave all the residue of his personal estate to his son Isaac Graham; and appointed him sole executor.

The testator died soon after the execution of his will. Afterwards, in 1774 Rebecca Graham Hanson died intestate at the age *of nine years; leaving her mother and her brother Thomas Hanson and her sister Mary Coates surviving. The mother died; and bequeathed all her personal estate to her son Thomas Hanson; and appointed him executor.

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The bill was filed by Thomas Hanson and Mary Coates against

† *Fox v. Fox* (1875) L. R. 19 Eq. 286.

HANSON Isaac Graham for an account of what was due in respect of
 v.
 GRAHAM. Rebecca Graham Hanson's legacy of 500*l.* &c.

Mr. Richards and *Mr. W. Agar*, for the plaintiffs. * *

Mr. Romilly and *Mr. Martin*, for the defendant. * *

Mr. Richards, in reply.

[The arguments of counsel and the cases cited by them sufficiently appear from the judgment of the MASTER OF THE ROLLS.]

July 8. THE MASTER OF THE ROLLS:

[*243] The question is, whether this legacy vested. It is contended for the plaintiffs, that it did vest, upon *two grounds; 1st. they say, it would have been vested; supposing, there was nothing more than the words, with which the clause begins; and that if it rested upon a legacy, when the legatee should attain the age of twenty-one or marriage, it is now settled, that these words give a vested interest; and that is established by *May v. Wood*; † and undoubtedly a proposition is there laid down; which would have the effect of making this a vested legacy; if it is true in the extent there stated. The proposition is there laid down very broadly and generally by the late MASTER OF THE ROLLS; that all the cases for half a century upon pecuniary legacies have determined the word “when,” not as denoting a condition precedent, but as only marking the period, when the party shall have the full benefit of the gift; except something appears upon the face of the will to shew, that his bounty shall not take place unless the time actually arrived.

This proposition is stated so broadly and generally, that I rather doubt the correctness of the report. Considering the well-known diligence of the late MASTER OF THE ROLLS in examining cases, and his uncommon accuracy in stating the result of them, he would hardly have drawn this conclusion from an examination of the cases; for no case has determined, that the word “when,” as referred to a period of life, standing by itself, and unqualified by any words or circumstances, has been ever held to denote

† 3 Br. C. C. 471.

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merely the time, at which it is to take effect in possession ; but standing so unqualified and uncontrolled it is a word of condition ; denoting the time, when the gift is to take effect in substance. That this is so, is evident upon mere general principles ; for it is just the same, speaking of an uncertain event, whether you say “when ” or “if ” it shall happen. Until it happens, that, which is grounded upon it, cannot take place. In the Civil Law the words “Cum” and “Si,” as referred to this subject, are precisely equivalent ; and from that law we borrow all, or at least the greatest part, of our rules upon legacies ; and particularly the rule upon the subject immediately under consideration in that case, with reference to the words, by which a testator denotes his intention as to the gift taking effect, or taking effect in possession. In the Digest† it is thus laid down :

“Si Titio, cum is annorum quatuordecim esset factus, legatus fuerit, et is ante quatuordecimum annum decesserit, verum est, ad hæredem ejus legatum non transire : quoniam non solum diem, sed et conditionem hoc legatum in se continet ; si effectus esset annorum quatuordecim. Qui autem in rerum natura non esset, annorum quatuordecim non esse non intellexeretur. Nec interest utrum scribatur : si annorum quatuordecim factus erit, an ita : cum priore scriptura per conditionem tempus demonstratur ; sequenti per tempus conditio : utrobique tamen eadem conditio est.” [*244]

It is very true: the word “when,” not so standing by itself, but coupled with other expressions or circumstances, that have a reference to the time, at which the possession of the thing is to take place, has been held by the civil law not to have so absolute a sense that it cannot possibly be controlled. Another passage in the Digest‡ is thus expressed :

“Seius Saturninus Archigubernus ex classe Britanica testamento fiduciarium reliquit heredem Valerium Maximum trierarchum : a quo petiit ut filio suo Seio Oceano, cum ad annos sedecim pervenisset, hereditatem restitueret. Seius Oceanus, antequam impleret annos, defunctus est.”

Then it states, that a claim was made by the uncle of Seius, as next of kin, which was resisted by the fiduciary heir, who con-

† Lib. 36, tit. 2, s. 22.

‡ Lib. 36, tit. 1, s. 46.

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tended, that, as Seius had not lived to the age of sixteen, it was not vested. The opinion is this :

“ Si Seius Oceanus, cui fideicommissa hereditas ex testamento Seii Saturnini, cum annos sedecim haberet, a Valerio Maximo fiduciario herede restitui debet, priusquam præfinitum tempus ætatis impleret, decessit : fiduciaria hereditas ad eum pertinet, ad quem cætera bona Oceani pertinuerint : quoniam dies fideicommissi vivo Oceano cessit : scilicet si prorogando tempus solutionis, tutelam magis heredi fiduciario permisisse, quam incertum diem fideicommissi constituuisse, videatur.”

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This distinction was transferred from the civil law to ours ; at least so far clearly as regards pecuniary legacies. In the case cited, *Stapleton v. Cheales*,† it was clearly held, that the expressions “ at twenty-one,” or “ if,” or “ when,” he shall attain twenty-one, were all one and the same ; and in each of those cases if the legatee died before that time, the legacy lapsed. I do not find any case, in which this position has ever been contradicted. In *Fonnereau v. Fonnereau*‡ it was clear, if it had stood upon the first part of that bequest, it would have been held not vested. Lord HARDWICKE rests entirely upon the subsequent words, as controlling the word “ when ;” as it would have operated, standing alone. That will sets out precisely as this does ; but when it went on with words, making the intention clear, giving interest for his education, with a power to the trustees to lay out any part of the principal to put him out apprentice, and the remainder to be paid to him, when he should attain the age of twenty-five, it was clear, upon the whole nothing but the payment was postponed.

A distinction has been introduced between the effect of giving a legacy at twenty-one and a legacy payable at twenty-one. That is also borrowed from the civil law. The Code§ thus states it :

“ Ex his verbis, do lego Æliæ Severinæ filiæ meæ, et Secundæ decem : quæ legata accipere debebit, cum ad legitimum statum pervenerit : non conditio fideicommisso vel legato inserta : sed petitio in tempus legitimæ ætatis dilata videtur : ”

For there the words were, that the time of payment was to be at her legitimate age :

+ Pre. Ch. 317 ; 2 Vern. 673.

§ Cod. Lib. 6, tit. 53, s. 5.

‡ 3 Atk. 645 ; 1 Ves. Sen. 118.

“Et ideo si Ælia Severina filia testatoris, cui legatum relictum est, die legati cedente, via functa est: ad heredem suum actionem transmisit; scilicet ut eo tempore solutio fiat, quo Severina, si rebus humanis subtracta non fuisset, vicissimum quintum annum ætatis implesset.”

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This distinction however has been held by some Equity Judges altogether without foundation; and by others it has been treated *as too refined. Lord Keeper WRIGHT, in *Yates v. Fettiplace*,† alluding to the distinction in *Godolphin* and *Swinburne* from the Civil Law, declared it altogether without foundation. Lord COWPER acknowledged, that it was at least a refinement: but he thought, it was now well established. Lord HARDWICKE likewise said, it was originally a refinement. But in what did that refinement consist? It was not in holding, that it should not vest before the age of twenty-one, but in holding, that it should vest, though the party should not attain that age: their opinion being, that it should not vest. Then why should we refine upon a refinement by deviating still more, and holding arbitrarily, that the word “when” standing by itself does not import condition; I say, that standing by itself it does import condition; and it requires other words to shew, it was meant to defer payment. But according to the report of the judgment in *May v. Wood*‡ it is quite the reverse; that standing alone it imports delay of payment; and other words are necessary to shew a condition. That is a distinction upon a distinction; which original distinction has by several great Judges been held to have been originally a refinement. The only cases alluded to in *May v. Wood* are cases of real estate; beginning with *Boraston’s* case;§ and ending with *Doe v. Lea*.|| The principle of them all is stated by Lord MANSFIELD in *Goodtitle v. Whitby*¶ in a way, that renders them perfectly consistent with the opinion I entertain as to the word “when,” standing by itself, unqualified and uncontrolled. Lord MANSFIELD there lays down these rules of construction:

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“1st, Wherever the whole property is devised, with a particular interest given out of it, it operates by way of exception out of the absolute property:”

† Pre. Ch. 140; 2 Vern. 416.

|| 1 R. R. 631 (3 T. R. 41).

‡ 3 Br. C. C. 471.

¶ 1 Bur. 228.

§ 3 Co. Rep. 16.

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“2dly, Where an absolute property is given, and a particular interest in the mean time, as until the devisee shall come of age, &c. and when he shall come of age, &c. then to him, &c. the rule is, that that shall not operate as a condition precedent, but as a description of the time, when the remainder-man is to take in possession.”

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There could be no doubt of the intention there. Every thing was given to the trustees for the benefit of the infant. He was entitled ultimately to have the whole. The reason of giving to the trustees in the mean time evidently was, that he was not intended to have the possession and management until the age of twenty-one.

Upon exactly the same ground was *Boraston's* case. It was not alleged in that case, that these were not words of contingency taken by themselves: but it was said, you must model these unapt words: so as to get at the intention from the whole will. The evident intention was to defer payment for a particular purpose; as if he had calculated, how many years it would take to pay off his debts, and in how many years Hugh Boraston would attain the age of twenty-one; and if given to the executors, with remainder to him at twenty-one, it would be clear vested remainder. The Court approves that argument of the counsel; but does not say, that “when,” standing by itself, would not have made a condition. So, in *Manfield v. Dugard* † it was clear the testator meant to postpone the enjoyment of the son for the sake of the antecedent benefit of the wife: but he clearly meant a vested remainder, not contingent, whether the son should take any benefit at all in the estate. But that makes a very different question from this; whether, where there is no precedent estate, no purpose whatsoever, for which the enjoyment was to be postponed, you shall say, the enjoyment only is to be postponed. So in *Doe v. Lea* the devisee was intended to have the whole benefit: but trustees were interposed, to keep the management of the estate, until he should attain the age of twenty-four; with a charge out of the rents and profits to keep the buildings in repair. There was a reason for postponing the possession; and it was evident, nothing but the enjoyment was intended to be postponed. It was not a bare devise to him, when he should attain twenty-four.

† 1 Eq. Ca. Ab. 195.

If those cases therefore had occurred as to pecuniary legacies there is no ground to say, the decision ought to have been different; for from the very same circumstances and expressions it might be collected, that the word “when” was used, not as a condition, but merely to postpone the enjoyment; the possession *in the mean time being disposed of in another way. It is impossible, that Lord MANSFIELD, and there is nothing in his judgment indicating it, could have considered the word “when” standing by itself, as other than a word of condition. It is impossible; for only two days before, in *Goss v. Nelson*† having occasion to speak of legacies, upon a note of hand, which he compared to the case of a legacy, he says, “but if the time is annexed to the substance of the gift, as a legacy, if, or when, he shall attain twenty-one, it will not vest, before that contingency happens.” He considered “when” precisely the same as “if.”

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Love v. L'Estrange‡ seems to have been considered a strong authority for holding “when” to operate conditionally. The late LORD CHANCELLOR was so strongly impressed with the idea he had thrown out at an early period in *Monkhouse v. Holme*,§ that he found it difficult to account for it otherwise than upon the distinction as to a residue; which the late MASTER OF THE ROLLS in *Booth v. Booth* acknowledged there might be. But it was not necessary to resort to that; for *Love v. L'Estrange* may be warranted upon the principles laid down in *Goodtitle v. Whitby*. It was not a simple, unqualified, gift; but there were many circumstances to shew, that Walter Nash was meant to have the benefit absolutely; and that the enjoyment only was postponed; the testator giving it to trustees in the mean time; and applying a reason for withholding the enjoyment from this minor; that he wished him to follow his trade as a journeyman; with which object he naturally thought that fortune would interfere; and therefore he postpones the enjoyment of it until the age of twenty-four. But he gives it to trustees entirely and absolutely for the benefit of Walter Nash; to improve it for his benefit; to transfer the whole to him, when he arrives at that age: and to make him a certain allowance in the mean time. That is very different from a simple bequest to him, when twenty-four; for if

† 1 Burr. 226.

‡ 3 Br. P. C. 337.

§ 1 Br. C. C. 298.

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that had been a legacy, it would have been separated from the residue immediately upon the testator's death ; and must have been paid over to the trustees immediately : and they would have managed it, until the legatee had attained the age of twenty-four.

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Upon the whole view of the cases, and taking the reason of the doctrine and the origin of it into consideration, there is no ground whatsoever for the generality of the proposition, which the MASTER OF THE ROLLS is represented to have laid down in *May v. Wood*. To that proposition the following words are added :

“ And not, where he has merely used the word ‘ when ’ for the sole purpose of postponing the time of payment.”

If the MASTER OF THE ROLLS meant so to qualify his former proposition, that I admit ; and have no difficulty in agreeing to it. But it is evident, that this is inaccurately taken ; for the two parts of the proposition do not accord. First, it is laid down generally, “ that it requires words to shew, ‘ when ’ does operate conditionally : ” in the latter part it is stated, that if it appears, “ when ” is used only for postponing payment, it shall not operate farther. Nothing can be clearer than that.

In this cause therefore I should have determined against the plaintiffs ; if it stood merely upon the first words. But then it is contended, that they are entitled ; because interest is given ; and that they come within an established rule of the Court ; that though such words are used as would not have vested the legacy, yet the circumstance of giving interest is an indication of intention, explanatory ; and denoting, that the testator meant the whole legacy to belong to the legatee. On the other side it was contended, that the interest is not so given as to bring it within the general rule, but what is given is more like maintenance. It is true, it has been held, that has not the same effect as giving interest ; upon this principle ; that nothing more than a maintenance can be called for ; what can be shewn to be necessary for maintenance : however large the interest may be ; and therefore what is not taken out of the fund for maintenance must follow the fate of the principal ; whatever that may be. But by this will it is clear, the whole interest is given. Can there be any doubt, that in this case all the interest became, as it fell due, the absolute property of these infants, as separated altogether

from the residue? All, that is left to the trustees, is to determine, in what manner it may be best employed. It is not merely so much of the interest as shall be necessary for the maintenance, but the interest entirely, *separated from the principal. It is therefore the simple case of interest. It was observed for the defendants, that here is not only the period of the age, but also marriage with consent; and it was asked, supposing any of them had married without the consent of the executors, was it to vest? That is just the same question. If it is shifted to the question, whether it is to be paid, if any of them married without consent, the executors might say, no: the period of payment had not arrived. But marriage with consent is not a condition precedent; for at the age of twenty-one, whether married with consent or not, they would be entitled. That therefore, not operating as a condition precedent, does not make any material distinction. The legacy is accompanied with an absolute gift of the interest; which according to the established rule has the effect of vesting it. I am therefore of opinion, that the plaintiffs are entitled.

HANSON
†
GRAHAM.

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LORD DURSLEY v. FITZHARDINGE
BERKELEY.†

(6 Vesey, 251—266.)

1801.
July 7, 9.

ELDON, L.C

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Bill to perpetuate testimony of the legitimacy of the plaintiffs, entitled in remainder in tail after an estate for life: Demurrer by the seventh and eighth in remainder after the plaintiffs and the other defendants, all infants, overruled: any interest, however slight, being sufficient.

The Court will not perpetuate testimony of a right, which may be immediately barred by the defendant.

THE bill, filed by four infant sons of Earl Berkeley against his two other infant sons and against Admiral Berkeley and his infant son, stated, that Earl Berkeley under the will of Lord Berkeley of Stratton is seised for life of estates in the county of Dorset with remainders to his first and other sons in tail male; remainder *to Admiral Berkeley for life, and to his first and other sons in

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† *Stockley v. Parsons* (1890) 45 Ch. D. 51, 57, 59 L. J. Ch. 666.

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tail male ; remainder to the testator's right heirs. Earl Berkeley has six sons living : viz. the four infant plaintiffs and two infant defendants : the eldest, Lord Dursley, born in 1786 ; the second in 1788 ; the third in 1789 ; the fourth in 1795 ; the fifth in October, 1796 ; and the sixth in February, 1800.

The bill proceeded to state pretences, that the plaintiffs are not the lawful issue of the Earl and Countess of Berkeley ; alleging, that they were not lawfully married until the 16th of May, 1796, after the birth of the plaintiffs ; when the Earl was married to the Countess at Lambeth church by her maiden name of Mary Cole, spinster ; and charged, that they were married on the 30th of March, 1785, at the parish church of Berkeley in the county of Gloucester by banns ; which were published, and the ceremony performed, by the Reverend Augustus Thomas Hupsman, deceased ; who was curate of that parish at the time of the publication of banns, and vicar of the parish at the time of the marriage. The second marriage was solemnized only as an act of caution and prudence in respect to any children, that might be afterwards born : the first marriage having been a considerable time concealed at the request of the Earl ; and there being great reason at the time the said marriage was made public, and the second marriage had, to apprehend, that the registry of the first marriage had been lost, and that a difficulty might occur in proving such marriage satisfactorily ; particularly, as Hupsman was dead, and the person, who officiated as clerk at the ceremony, and who was one of the subscribing witnesses to the marriage, was also dead, or not to be found ; but which registry and the entry of the publication of banns have lately been found ; and as evidence the plaintiffs charge, that the Earl being desirous, that his marriage should be kept secret for some time, consulted Hupsman as to the best manner of celebrating it so that it should not be known to his friends. Hupsman recommended him to be married at the parish church of Berkeley by banns ; which were accordingly published, and the marriage had, in the presence of William Tudor and Richard Browne ; and the entry was duly made of the publication and the due registry of the marriage, signed by the parties and the witnesses. The bill farther charged, that Hupsman several

times afterwards and prior to the birth of the plaintiff Lord Dursley, *informed several persons of the marriage; and many persons in the neighbourhood believed it; and the Countess herself soon afterwards mentioned it to the Earl in the presence of others; and he did not contradict her. The prayer of the bill was, that the testimony might be perpetuated.

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To this bill the defendants Admiral Berkeley and his son put in a demurrer; stating, that the plaintiffs have not by their bill made a case to entitle them to have their witnesses examined, and their testimony perpetuated against the defendants; that it appears by the bill, that the two other defendants are the natural and lawful sons, born in lawful wedlock; and that they are tenants in tail male; and the limitations to Admiral Berkeley and his first and other sons in tail male are posterior to the estates in tail male given to the other defendants; and therefore these defendants are not necessary parties to the bill, nor ought to have been made defendants; and the putting them to answer the bill and to be parties to the examination of the witnesses tends to create expense upon the part of the defendants.

The other defendants waited the result of this demurrer.

Mr. Richards and *Mr. Hollist*, for the demurrer :

There are now parties upon the record, who are tenants in tail in remainder anterior to any interest in Admiral Berkeley and his son. * * * They cited *Smith v. Att.-Gen.* (see next page), *Seaborne v. Clifton* (see *post*, p. 292), and other cases.

Mr. Mansfield, *Mr. Romilly*, and *Mr. Stanley*, in support of the bill :

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It is perfectly established, that this bill lies for every person having a legal right; which he cannot bring into immediate discussion; however it arises. * * * These are vested remainders.

Mr. Richards, in reply. * * *

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LORD CHANCELLOR :

Before I decide this case, which is very singular, I shall look

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into all the authorities cited; not on account of the singularity of the case, but as to the general doctrine. No difficulty is alleged as to examining Tudor. In arguing this demurrer the fact as to the first marriage must for the present be taken to be true. The question therefore is, whether according to the rules of this Court the plaintiff has a right to perpetuate the testimony of that circumstance, taken for the present as a fact? It is going beside the fact to examine the probability, or the reason of not bringing forward the alleged illegitimacy in the life of the clergyman who, it is alleged, celebrated the marriage. The story does not hang very well together, as to the publication of banns in the parish church, recommended by him as the best mode of keeping the marriage secret. There might be a marriage *de facto*, and a colourable publication of banns; and it might be convenient to him, that the real circumstances, by which he had contrived a marriage *de facto*, should not come out. His greater or less degree of criminality however certainly cannot affect these children. I must also lay out of the question, whether there could be a more convenient, just, or effectual, mode of ascertaining the fact of the *marriage at present; or, whether it could be ascertained. The bill does not seek to ascertain it; but to preserve the means of duly trying the fact; when an opportunity shall arise of conveniently and usefully trying it. This plaintiff comes, stating himself not to have the means by any gift of property by his father or otherwise of trying the question at present: his father not having furnished those means by a conveyance or surrender of his estate. The question therefore is, whether a tenant in tail in remainder, without the means of provoking a trial at present, can file such a bill. It appears to me very difficult to conceive, that he has not that right. The case of *Smith v. The Attorney-General*† went upon this; that the next of kin of the lunatic had no interest whatever in the property. Put the case as high as possible; that the lunatic is intestate; that he is in the most hopeless state, a moral and physical impossibility, though the law would not so regard it, that he should ever recover, even,

† In Chancery (1777) before Lord Justice De Grey and Lord Chief Bathurst, assisted by Lord Chief Baron Skynner.

if he was *in articulo mortis*, and the bill was filed at that instant, the plaintiff could not qualify himself as having any interest in the subject of the suit. The case of an heir apparent was very properly put by Lord Chief Justice DE GREY in his most luminous judgment. Upon that occasion he said, he never liked equity so well as when it was like law. The day before I heard Lord MANSFIELD say, he never liked law so well as when it was like equity ; remarkable sayings of those two great men, which made a strong impression on my memory. Lord Chief Justice DE GREY said, that at law the heir apparent cannot have the writ *de ventre inspiciendo* in the life of his ancestor ; as for that purpose he must be *verus hæres*. If the ancestor was in a fever, a delirium, having made no will, and it was not possible for him to recover, still the law would look upon him as mere heir apparent, having nothing but an expectation, which is different from an expectancy in the legal sense, and as having no interest whatever upon that ground. In *Smith v. The Attorney-General* it was held, that the bill would not lie. It is not to be taken upon the single dictum of any of the learned Judges, who assisted upon that occasion : but the whole judgment went upon distinguishing between that expectation, which the next of kin have in that case, and any sort of right, which the law allows to be an interest. A contingent interest is not the less a present interest. It was not doubted in that judgment, that a vested interest, *though in possibility the least valuable, that could be conceived, is yet of some value in consideration of law ; and gives a right to preserve testimony. In the course of that cause cases were cited ; which go to this ; that though the next of kin could not file a bill, or the heir apparent in the case put, yet they might respectively enter into contracts with respect to their expectations and possibilities ; the evidence upon which they might perpetuate. The law would frame an interest in respect to the contract ; and with reference to that they would have a right to perpetuate testimony ; though they could not qualify themselves as to any interest in the subject itself.

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It appears therefore, that unless there are grounds for entertaining doubt, with which at present I am not impressed, the plaintiff has a sufficient interest to support this bill ; if these

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defendants are proper parties. As to that, independent of the intermediate estates tail, upon the principles I have already stated there can be no doubt; for their interest is exactly of the same species; though less valuable, because posterior. Next, does the intervention of the other estates tail prevent their being proper defendants? If so, the converse must certainly be maintained; for if these estates tail intervening could prevent their being defendants, the consequence would follow, that if these defendants contended upon the strongest evidence of circumstances, that the elder children were illegitimate, and were able to represent this case, that the two youngest children were of very tender years, and of such puny constitutions, that there was no moral probability, that either of them would attain the age of twenty-one, it must be admitted upon these principles, that these defendants could not as plaintiffs sustain a bill of this sort. That would not be very convenient to justice. I can conceive a power in a tenant in tail to say, a remainder-man should not file such a bill. Suppose an eldest son illegitimate; and the father expressly devised to him in tail; leaving the reversion to descend; and that he also had a son by marriage: and a dispute had arisen; the eldest insisting, he was not illegitimate; and the younger, that the first marriage was to his mother; and he, as reversioner should file a bill to perpetuate testimony. I am not quite sure, that in such a case the elder might not say, he being in possession as a tenant in tail might suffer *a recovery, and destroy the reversion; and therefore equity could not interfere. That might perhaps be sustained by analogy to other cases: as, where there was a tenant of a lease for lives to him and the heirs of his body; and the lease was renewed to him and his heirs: according to the ordinary doctrine the equitable title would attach upon the legal estate; and upon a bill by a person entitled in remainder, for the purpose of attaching the equities of the old lease upon the new one, the Court said, it was nugatory; for by a deed he might bar them all; and say, he did not choose, the equities of the old lease should attach upon the new one. That might possibly apply to the case I have just put, and support a demurrer by the elder son to the bill

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of the younger, upon the ground, that a recovery would bar him.

But that is very different from this case; for no one can at present bar the estate tail. The argument cannot vary from the number of estates tail. These defendants at the utmost can only contend, that there are two remainder-men in tail, infants; neither of whom may ever be able to bar them. As to the consequence in point of convenience, I am much struck with the argument in support of the bill. Is it inconvenient to general justice, or to these defendants, that they should be parties? First, the question imports all the persons to take an estate; all the interests making up the fee; and it is as necessary in the view of what general justice requires, that the testimony should be perpetuated against these defendants as that they should perpetuate the non-existence of the plaintiff's title; and with regard to the individuals it cannot be unjust to secure to these defendants the opportunity of cross-examining now to the extent, in which there must be a cross-examination. They must decide for themselves as to the prudence of leaving the story with all the doubt, that hangs about it, or of cross-examining: but if it is fit to cross-examine, justice requires, that the defendants, who may be affected by the evidence, (for it is admitted in the argument for the demurrer, that the evidence will bind them) should have the opportunity of deciding for themselves, whether it is prudent, and whether they will now have the cross-examination. I express it thus; for it may be, that now only they will have the opportunity. I agree to the answer to the objection as to the costs. It is a sufficient ground for protecting a defendant from a suit, that he may *be vexed by it, independent of any pecuniary consideration; and if he can defend himself against the demand, it is not an answer, that he will some time or other have his costs.

In my present view of this case the demurrer must be overruled; unless I should alter that opinion upon looking at these cases.

LORD CHANCELLOR:

I have looked through all the cases upon this subject; and

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I cannot find any case having a tendency to affect the opinion I intimated, except that case stated in Eq. Ca. Ab. and also in Vernon, under the name of *Seaborne v. Clifton*;† which in both books stands thus: a bill by a person, claiming a reversion, to perpetuate testimony, against a purchaser for valuable consideration. The books treat the demurrer as having been allowed upon that ground; and in Vernon it is stated, that the bill was dismissed; and the party lost the estate for want of examining the witnesses. I am much obliged to Mr. Hollist; who has furnished me with an extract from that case in the Register's Book; from which it appears, that the case amounts to no decision at all. The son filed the bill upon this point; that his deed was genuine; and the other forged. The causes of demurrer were, 1st, that this was a strange Court to prove a forgery in: 2ndly, a purchase for valuable consideration. The Judge presiding here gave no opinion; but desired Mr. Justice ARCHER to talk with the Judges upon it. The result does not appear. Unquestionably the bill was not dismissed upon any of the grounds stated in the printed books: but under a suggestion, that the defendant had taken advantage of a slip to put in a demurrer, leave was given to the plaintiff to withdraw his bill on payment of very moderate costs. That is by no means an authority, that, if two persons are claiming a reversion, where one only can be entitled to it, a bill to perpetuate testimony will not lie. Nor did it establish a principle, which I think very difficult to maintain, that, if one of them had sold his title to a third person, a bill to perpetuate testimony could not be maintained; for such a bill calls for no discovery from the defendant; but merely prays to secure that testimony; which might be had at that time, if the circumstances called for it. If therefore that case had only this distinction, of a *purchase for valuable consideration, it would require a good deal of consideration, before it should be disposed of, as turning upon a principle not applicable to this case. But, taking that not to be an authority upon this case, and particularly not to be an authority upon the reasons given in the printed books, it seems to me, that, independent of the

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† 2 Vern. 159.

circumstance of there being four plaintiffs here and six tenants in tail, the whole reasoning in *Smith v. The Attorney-General* goes to this point ; that a remainder-man has a present interest, future in enjoyment, but as real in the contemplation of the law, as if he was then seised in fee ; and as against another person having a real interest of the same nature that case has gone the length of deciding, that a bill to perpetuate testimony is capable of being supported, and a demurrer to it could not be allowed.

The specialties of the case are, that there are four plaintiffs, all tenants in tail, and two defendants, tenants in tail, standing at all events with priority of interest and priority of title to Admiral Berkeley and his son : but upon the principles I before stated it seems to me, that those specialties will not take this case out of the rule ; particularly, where the two tenants in tail are infants, and never may have the enjoyment ; and where upon the single fact of a legal marriage in 1785 the title of all these children will be to be decided. I am much struck with the circumstance (though it may have been unavoidable) that the bill states a case clear of doubt ; and then clothes it with infinite doubt ; for it states this case ; that there was a marriage in fact in 1785 ; that there is a living witness of that marriage ; that there is a register ; that there was a due publication of banns, and that there is now an entry of the marriage producible, signed by the parties and by the witnesses to that marriage. If these circumstances stood alone, the bill would not state a case of any doubt or a case of perishable testimony, if I may so express myself : but upon the whole enough has been stated of the circumstances upon this bill to raise as questionable a case in fact as could be put upon a record ; for it states, that the marriage was for certain reasons intended to be kept secret for some time ; and the means of accomplishing that object are certainly very singular : the marriage being attended with as much publicity and notoriety as could be given to it : a *marriage in the parish church of Berkeley ; and according to this bill, attended with a due publication of banns ; with all the circumstances, that belong to a marriage ; a due registry and signing by all the parties present ; and it alleges, that the thing was quite notorious ; that the clergyman and parties were constantly talking about

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it; and it became the habit and repute of the place. The bill alleges, that because apprehensions were entertained, upon what foundation does not appear, that the registry was lost, and because the clergyman was dead, and one of the witnesses was either dead or not to be found, under these circumstances it was thought prudent to have another marriage. As a circumstance of evidence for the consideration of a jury that is pregnant with a great deal of observation; for however prudent it might be as to the future issue, it was not marked with singular prudence to marry again under the maiden name of the lady, in order to prove the legitimacy of four children born antecedent to the second marriage. A great deal of consideration ought to be had, if this should come before a jury, which course it probably must take at last, as to the actual treatment of the children, born before and after this marriage, in the family.

But whatever difficulties arise in my mind upon this, the plaintiff has stated upon his bill a case of an actual legal marriage, to be proved under all the difficulties, that belong to it: with respect to which I think upon the principles I stated before he has a right to perpetuate testimony. Independent of the consideration of general justice, and the particular ground in this case, cases might be put, and none can warrant the observation more than this cause, in which a bill to perpetuate testimony may be an excessively dangerous proceeding; and upon that ground it is handsomely done towards justice by the plaintiff to make Admiral Berkeley and his son parties. He must be well acquainted, or at least has a better chance than others of being acquainted, with all, that has passed in the family; and therefore he will have the opportunity, if he chooses to make use of it, to take a complete view of all the circumstances, to decide upon the condition of these children, and to bring out all the known facts; that it may be determined for the sake of those, who are infants, what it may be proper to do with regard to the cross-examination; whether there should be any cross-examination; or, if any, to what extent.

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I do not know, who is the next friend of the children claiming under the second marriage: but I must say, that, whoever

he is, no man ever took upon himself a more solemn and more delicate duty. If he for any reasons of connection with any part of the family does not exert himself for those children as zealously as if he was supporting his own claim to the dearest interest in life, he does not do his duty to those children. I say this; because, though this bill may be as properly conducted, as it may be most essential to the justice due to the children claiming under the first marriage that it should be conducted, yet if it should not be so conducted, it may be an instrument of mischief and oppression, or what would even require a harsher name, to the children claiming under the second marriage. It is some consolation to the Court, that the bill can be maintained against persons, who have an interest of a pecuniary value; which will enable them to aid those, who stood in the sacred relation of next friend to the children claiming under the second marriage.†

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The demurrer was over-ruled.

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(6 Vesey, 266—280.)

1801.
July 8, 2.

Sale of an annuity by an attorney to his client set aside under the circumstances.

ELDON, L.C.

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General rule, that he, who bargains in matter of advantage with a person placing confidence in him is bound to shew, that a reasonable use has been made of that confidence.

THE bill was filed by the administrator of Ann Kerby to set aside the sale of an annuity by the defendant John Jeyes to Ann Kerby for her life under the following circumstances.

Mrs. Kerby, a widow, above the age of seventy, residing at Northampton, employed Jeyes, an attorney of the same place, as her agent. The transaction, which produced this suit, took place in 1798. Mrs. Kerby, being possessed of 900*l.* 4 per cent. Bank Consolidated Annuities, 100*l.* of which the defendant had sold out for her under a letter of attorney in May, 1798, executed

† The result of the investigation in 1796, as the only marriage in the House of Lords upon the right to the title established the marriage † *Luddy's Trustees v. Peard* (1884) 33 Ch. D. 500; 55 L. J. Ch. 884.

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a letter of attorney, dated the 21st of November, 1798, empowering Theophilus Jeyes, the son of the defendant, to sell out the remaining 800*l.*; which he accordingly did, for the sum of 514*l.* 17*s.* 6*d.* Soon afterwards the defendant received 400*l.*, as the consideration agreed upon for an annuity of 50*l.* a-year to Mrs. Kerby for her life; for securing which he gave her his bond, *dated the 26th of December, 1798, in the penalty of 800*l.* Jeyes at that time was at the age of eighty. Mrs. Kerby died upon the 28th of March, 1799, about three days after the first quarter became due, but not having received any part of it except two guineas from young Jeyes. Her death was in consequence of a paralytic stroke. Before this transaction she had attempted to sell a house, with a view to purchase an annuity; which project failed from a difficulty in the title.

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The bill prayed, that the stock might be replaced; and charged, that this transaction was a fraud; that from the age as well as state of health of Mrs. Kerby the price was much more than the annuity was worth, and might have been purchased for according to the office calculation; that at the times of executing the two powers of attorney, and the bond she was so debilitated in her mind as to be incapable of forming any judgment for herself upon the transaction or of transacting business; and that Theophilus Jeyes was obliged to point out to her the letters of her name; which fact was not denied.

It appeared by the evidence of the apothecary, who had attended her many years, that from the 26th of October to the 2nd of November, 1798, she was very much indisposed by a violent bilious complaint; from which she soon recovered; and it did not appear to him to have affected her mind. But by the other evidence produced by the plaintiff, consisting of servants, who were constantly with her, and friends and others, who saw her frequently, imbecility of mind in a considerable degree, increasing for three or four years previous to her death, was established; and it appeared, that she did not understand the nature of the transaction with Jeyes; having a notion, that he was to keep her money for her, and let her have it, as she wanted it. This was opposed on the part of the defendant by the evidence of persons, who saw her occasionally, in favour of her general

capacity, and her health, considering her time of life. Theophilus Jeyes by his depositions in support of the answer of his father represented, that Mrs. Kerby had been very anxious to increase her income by the purchase of an annuity for her life; for which she had made applications to different persons; but refused an offer from William Gibson, the father of the plaintiff; who said, he would give more than any *one else; and actually offered an annuity of 60*l.*, secured upon land; declaring her reason, that she would have no concern or business with him. The deponent advised her to defer her purpose; the stocks being then low; and after some delay upon her still persisting recommended her to accept the offer of Gibson; to which she positively objected; saying she would have nothing to do with him, and complaining, that he had not behaved well to her. After some days she expressed a wish, that the deponent would ask the defendant to grant her an annuity for her life; which the defendant at first refused; but being repeatedly pressed at length complied with reluctance. The deponent had procured for her the table of the terms of the Royal Exchange Assurance Office; and she declared she would much rather purchase an annuity from the defendant; but would from the office, if he refused. She strictly enjoined the deponent not to mention, that this business had been so settled, to any person, and particularly to William Gibson; with whom she was then on tolerable terms, and did not wish to fall out with him; but was determined to have no dealings with him, &c. She afterwards upon receiving the bond registered expressed her satisfaction. On the 22nd of March, 1799, she sent for the money, that would be due to her on Lady-day; and the deponent sent her two guineas on account of the first quarterly payment of the annuity.

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Other witnesses also stated, that previously to Christmas 1798 she had expressed uneasiness, that she could not prevail upon Mr. Jeyes to take her money upon the terms she wished, viz. to allow her a yearly sum in lieu thereof; and afterwards, she expressed her satisfaction at having prevailed upon him to do so.

The actuary of an Assurance Office, examined on behalf of the plaintiff, stated, that a person of the age of seventy years and a half in as good a state of health as persons generally enjoy at that

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age ought for a sum of 400*l.* to receive an annuity, payable quarterly, of 64*l.* 3*s.* during the term of such person's natural life : but a person of that age in an infirm state of health ought to receive more. The actuary of another office on the other side deposed, that, supposing Mrs. Kerby to have been of the age of seventy years and a half, and not labouring under any particular complaint or infirmity of body, but enjoying a good state of *health, and living a regular life, and not given to any kind of excess, the value of an annuity of 50*l.* a year for her life, payable quarterly, was 438*l.* 10*s.* ; which is eight years and about three quarters of a year's purchase ; which was the fair price of the said annuity on the 26th of December, 1798, under the circumstances aforesaid.

The defendant stated, that previously to this transaction the partnership between him and his son had ceased : but the weight of evidence was the other way ; and an advertisement of a subsequent date in their joint names as partners was produced.

The Solicitor-General, Mr. Sutton, and Mr. Stratford, for the plaintiff :

The evidence in this case does not amount to this ; that Jeyes the father, suggested the idea of the sale of an annuity : but it proves, that, however that was suggested, he took advantage of this old lady. The grounds upon which this relief is sought, are inadequacy of consideration, the circumstances of imbecility, under which she engaged in this transaction, and principally the situation of the defendant as an attorney. * * The principle, upon which these cases turn, is stated by *Mr. Mansfield* in *Fox v. Mackreth* ; † that where one person takes an unfair advantage of another, it is the peculiar province of equity to give relief.
* * *

Mr. Mansfield, Mr. Lloyd, and Mr. Fonblanque, for the defendant :

This defendant had ceased to be attorney to Mrs. Kerby ; and was succeeded in that character by his son. The rules as to attorneys therefore have no application. But there is no rule

† 2 R. R. 55 (2 Br. C. C. 400).

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that an attorney may not deal with his client, if he deals upon fair terms. Certainly the Court cannot watch the transaction too narrowly. In *Swayne's* case,† determined by Lord NORTHINGTON, he was trustee as well as attorney; yet the transaction was established. It is now fully settled, that a trustee, whether attorney, or not, may, if the agreement is fair, buy of his *cestui que trust*. In many cases the Court has relieved upon collateral circumstances; but never upon the single circumstance, that one party was the attorney. * * *

LORD CHANCELLOR :

I do not mean to contradict the cases of trustees buying from their *cestuis que trust*: but the relation *between the parties must be changed: that is, the confidence in the party, the trustee or attorney, must be withdrawn. That is the principle of the cases of a trustee buying for himself. There is evidence enough in this case, that Mrs. Kerby knew what she was about; though the younger Jeyes has not denied the very serious charge against him, that he was obliged to point out the letters of her name, when executing the power of attorney. The evidence of incapacity relates to the state of her body: but it is clear, her mind had suffered by the shock her health had received. An attorney buying from his client can never support it; unless he can prove, that his diligence to do the best for the vendor has been as great, as if he was only an attorney, dealing for that vendor with a stranger. That must be the rule. If it appears, that in that bargain he has got an advantage by his diligence being surprised, putting fraud and incapacity out of the question, which advantage with due diligence he would have prevented another person from getting, a contract under such circumstances shall not stand. The principle, so stated, may bear hard in a particular case: but I must lay down a general principle, that will apply to all cases; and I know none short of that, if the attorney of the vendor is to be admitted to bargain for his own interest; where it is his duty to advise the vendor against himself. The younger Jeyes did not do his duty, as the Court would expect it. I put the question thus, without adverting to

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† Cited 2 Br. C. C. in *Fox v. Mactreth*.

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his taking the power of attorney, and selling the stock, before any specific treaty for an annuity was entered into. It was his duty to have duly informed himself of the state of her health and the other circumstances; with reference to which perhaps many persons would have dealt upon much more liberal terms than either an office or the defendant. I cannot consider personal security as sufficient. But, from the general danger the Court must hold, that if the attorney does mix himself with the character of vendor he must shew to demonstration, for that must not be left in doubt, that no industry he was bound to exert would have got a better bargain. Therefore, without imputing fraud, a general principle of public policy makes it impossible, that this bargain can stand. * * *

The Solicitor-General, in reply. * * *

LORD CHANCELLOR :

This case is put first upon incompetency to make such a contract: 2ndly, Upon the insufficiency of the consideration; and the last ground is, that, if upon the mere incompetency or deficiency of the consideration there is no ground for relief, yet in the relation of the parties contracting the Court can find a principle, upon which they will rescind the contract; though between parties not so connected they might have permitted it to stand. Attending to the third ground, there is enough in this case to authorize the Court to say, there is probable evidence [*273] * of incompetency; the evidence of some degree of insufficiency of consideration, that can be felt, not as Lord THURLOW said in the case referred to, but as extremely material evidence, where it is to be connected with the third ground; whether that reasonable attention has been given to the interest of the purchaser, which under all the circumstances Jeyes was bound to give that interest. But I go a great deal farther; for upon the transactions disclosed by the evidence it is fairly questionable, whether this case might not support a Commission, not of lunacy, but in the nature of a writ *de lunatico inquirendo*; in which it must be remembered, it is not necessary to establish lunacy; but it is sufficient, that the party is incapable of managing his own affairs.

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I do not say, all this fell under the view of Jeyes; if it can be established with regard to the acts of this lady: but it is not sufficient to protect a party against the effect of such a proceeding, if it could be made out, that in visits such passages in her conduct did not fall under the observation of those, who visited her; for the proceeding would be to protect her against what her acts might be, when such acts did fall under the observation of third persons. Taking into consideration the circumstance of the execution of the power of attorney, and the folly of what she did, grounded upon the apprehension, that her income must be raised by any means, imbecility of mind and great improvidence are in this respect established; and upon a trial, whether she was to be trusted with the general management of her affairs, which would take in the periods, when she was in that situation, the probable result would be incapacity to that extent.

With regard to the insufficiency of value, where the case is put upon mere inadequacy no relation whatsoever subsisting between the parties, inducing one to repose confidence, and putting the other under the obligation of all the duty that situation requires, it was stated by Lord THURLOW in those cases, that you cannot affect the bargain upon mere inadequacy; unless it is so gross as to shock the conscience of any man, who heard the terms. That principle is loose enough: but it is one, by which Judges in Equity have felt themselves bound, and to act upon occasionally for the safety of mankind. There is no pretence for saying, *the inadequacy in this case is gross in that degree. If it stood therefore upon that ground merely, it would be very hazardous to rescind this transaction. But the result is, that there is at least a most high moral probability, that with that diligence, which I will not say deserves a higher character than that of reasonable diligence, better terms might have been obtained for this lady.

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I do not enter into the propriety of what was or was not done in former cases with reference to the market price of an annuity. If such a case should arise before me, my mind will be distressed by a number of considerations, that have hung upon it for many years as to that class of cases. To say, in the case of a grantor of the age of thirty, who has been covered with

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disease, probably affecting the duration of life, for many years, and in a greater or less degree, that is not to be considered with reference to the fairness of the bargain, is not easily reconcileable to reason. I am sure, it is not reconcileable to fact, even upon the Court's own principle; for when Lord THURLOW got the length of thinking it fit with regard to insurance to consider that circumstance, it seems equally reasonable, that in determining upon the adequacy of value he must look at the nature of the life itself; upon the nature and circumstances of which the insurance turns. Another circumstance is to be attended to. What an annuity is worth depends upon the circumstances of the party and the security. But it depends upon much nicer points: the prudence of the grantor; who may be in circumstances at the time quite unexceptionable. I cannot see, upon what principle it is said, the market price is to determine. In *Heathcote v. Paignon*† the market price was reported to be six years purchase; and it was asserted in the report, which made no sort of distinction upon the circumstances of the grantor, the nature of the security, the state of health, or any one fact, that would enter into the consideration of a prudent purchaser, and even of an honest seller. The grantor was a young man, about thirty; but he had had two or three smart fits of the gout; and he was a young man, whose state of life as to the duration of it, with reference to that circumstance, was one, at which no prudent man could shut his eyes, nor any honest man desire it. Therefore upon the ordinary cases of annuities I must enter into the circumstances; or say, that notwithstanding all, that prudent *and honest individuals would do out of Court, I must determine upon the market price in all cases.

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But it is not upon the adequacy or inadequacy of value that it appears to me, this bargain cannot be held by Mr. Jeves. To state it not too high, I will state, that this lady had lived to a very advanced period of life: a period, at which the Court does not strain much in saying, the client is entitled to all the providence and care the attorney's best and most active care can throw round her. Her affairs and those of her husband had been under the care of the defendant. This Court cannot proceed

† 2 Br. C. C. 167.

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upon those nice and delicate considerations in matters of property, that would suggest to him, that as matter of moral, and therefore imperfect, obligation, arising from that connection, there ought to have been upon his part a tendency not to discover that degree of tediousness and caprice, that made him weary of the connection : but if he did discover it in that degree, he ought to have dissolved the relation between them. At her age, of itself entitling her to the protection and providence I have stated, she had suffered in her health to a degree established by the evidence. That that was known to the defendant is a fact too much in doubt to be asserted : but that her health was not very good at her years is obvious upon the whole of the evidence. Under these circumstances she had some improvidence about her affairs ; or, as the defendant will say, an inclination to augment her comforts. The mode she had adopted was selling a house for an annuity. That transaction went off upon some difficulty as to the title. If the defendant, who certainly did not mingle himself in that transaction, had bought that house, and taken a conveyance of it, and being her attorney in the article of selling the house had permitted her to take nothing but a bond for an annuity, I could not well permit that species of dealing. That treaty going off, another plan was thought of. I now give credit to this ; that it was her real purpose to bring the money produced by the sale of her stock to Northampton for the purchase of an annuity ; though the evidence puts it in great doubt, whether she did not bring it for the purpose of spending it, as she wanted it. The younger Jyes was employed to go to London to sell out the stock. I do not examine, why he did not state to her, that that was very imprudent : *no treaty for an annuity being entered into : nothing appearing to shew, it was a prudent act to permit him to bring it home, to lie dead in a chest, and to be acted upon by her improvidence. It is not to be forgotten certainly, that he was obliged to point out to her how to spell her name, when executing the power of attorney. It is necessary to say broadly, that those, who meddle with such transactions, take upon themselves the whole proof, that the thing is righteous. The circumstances, that pass upon such transactions, may be consistent with honest intentions : but they are so delicate in

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their nature, that parties must not complain of being called on to prove, they are so. It appears upon the account, that this money was duly rendered to her; and all the items of charge are not only unexceptionable, but very reasonable. Her purpose of buying an annuity, it seems, had taken vast hold upon her mind. It was part of the moral and imperfect obligation upon Jeyes to contend against her purpose as much as possible: this however is in some degree excusable: as persons do not choose to advise against the inclinations of those they are advising. The conduct of King and Gibson, the one endeavouring to purchase her property, the other persuading her to sell, is in a degree inconsistent with their imputation of imbecility. But there is a wide difference between that transaction and that with Jeyes. It is very difficult for persons, in a moral and reasonable view having fair expectations of property, to determine how to act. In the case of a person liable to a commission of lunacy the feeling of a relation unwilling to take out a commission is not to be disapproved. The proposition of Gibson at the least was to give 60*l.* a year with landed security; and also to give 5*l.* or 10*l.* more than any one else would give; and if that was the purpose, with a view to bring home that property into the pockets of those, who had the natural claim to it, it cannot be said, that transaction stands under the same circumstances, as if a stranger was to take that to himself. But it is very different, when it is the case, not of a stranger, but of the attorney, acting under the confidence placed in an attorney, in an instance, in which the principles of this Court entitle me to say, he ought to have acted with more providence and attention than are required even in the case of parent and child.

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It has been truly said, an attorney is not incapable of contracting with his client. He may for a horse, an estate, &c. A trustee also may deal with his *cestui que trust*; but the relation must be in some way dissolved: or, if not, the parties must be put so much at arm's length, that they agree to take the characters of purchaser and vendor; and you must examine, whether all the duties of those characters have been performed. In the late case of *Fox v. Mackreth*† it was never denied, that Mackreth might have purchased Fox's estate. When that cause was in-

† 2 R. R. 55 (2 Br. C. C. 400).

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this Court, I said, there never was an order more liable to objection than the order dissolving the injunction ; for independent of all the circumstances in that cause this was proved upon the motion ; that, giving the defendant credit for every thing he insisted he was entitled to, the Court overlooked the circumstance, that he had money in his hands due to the plaintiff beyond that, for which he was suing at law. That case was decided upon these grounds ; that though he might have discharged himself from the relation, as trustee, he had not done so : on the contrary he distinctly stated, he would not conclude any thing as to the character of trustee with regard to third persons ; carrying on the treaty as to Page's estate by surveyors paid by Fox ; and gaining intelligence at the expense of the *cestui que trust*. An issue was pressed, whether Fox had not received enough for the estate ; though Mackreth had sold it for more : but the question was not upon the fact, whether the price paid to Fox was sufficient, but upon the principle, whether under the circumstances, if Mackreth had made more, he had disentangled himself from that situation, in which every benefit made by him was to result to the *cestui que trust*. The only fact was, whether he was disentangled from that situation. The moment it was decided, that he was not, it did not signify, whether the estate was sold upon fair terms between him and Fox ; for even a benefit arising by accident upon the principles of this Court should accrue to the plaintiff. The argument for an issue therefore went quite beyond the question ; and the case might have been decided upon that principle in a great measure free from the implication of fraud.

With respect to the case of the attorney, I have no difficulty in saying, Jeyes might have dealt for this annuity : but he had two ways of proceeding ; which this Court must have held it quite incumbent upon him, dealing with this lady, to attend to. If she proposed to him to buy it, he would have done well to have said to her, that Gibson would give more than any one else ; that it was his interest to do so ; that he would secure it upon real estate ; that it was more fit for her to deal with her relation than her attorney ; and the transaction would have a better appearance in the world. It was natural enough, that she should

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answer, she would not deal with Gibson, but would consider herself only and her own comforts, according to Benyon's advice to her. Then it would have been right for the defendant to have declined it. Suppose, she had insisted, that he should be the person: it would be too much for the Court to proceed upon delicacies, such as these, and to say, he should not permit himself to contract with her. Therefore I say, he might contract: but then he should have said, if he was to deal with her for this, she must get another attorney to advise her as to the value: or, if she would not, then out of that state of circumstances this clear duty results from the rule of this Court, and throws upon him the whole *onus* of the case; that, if he will mix with the character of attorney that of vendor, he shall, if the propriety of the contract comes in question, manifest, that he has given her all that reasonable advice against himself, that he would have given her against a third person. It is asked, where is that rule to be found. I answer, in that great rule of the Court, that he, who bargains in matter of advantage with a person placing confidence in him is bound to shew, that a reasonable use has been made of that confidence; a rule applying to trustees, attorneys, or any one else.

If that is the rule, see, how this transaction proceeds. First, with regard to the security. This lady, at the age of seventy-one, in possession of stock, which had produced this money, and which therefore might have been in a certain way made a security *pro tanto* for the payment of the annuity, deals with a person stated to be in very good circumstances, but of the age of eighty, with a large family; among whom that property will probably be parcelled out by distribution. He proposes a bond as a security for her daily bread? Is that what a court of justice can approve. *It would have been his duty, advising her as against a third person, to have said, that in the natural course of things that person of the age of eighty, nine or ten years older than herself, might die in her life; and she, surviving perhaps several years, would have to go, not to any specific fund, the stock or the money, not even to Gibson's public-houses, to which as a security she had objected, but to get administration as a creditor, or to follow the representatives. : It was his duty to say

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that as against himself. But in other respects he did not exert reasonable diligence; for there was an absolute duty upon him to have made the most, not only of the circumstance of age, but also of the actual state, in which she was. If he had been dealing to the best advantage with a stranger, it would have been his duty to make accurate inquiries as to her state of health; and when proposing the purchase to a public office, but more especially to individuals, he should have gone on behalf of his client with all the information, that would have given her any advantage. If he had made inquiry of those living with her, he must have learned the probability, that there was something more than a bilious disorder, and of a kind, that might most materially affect the consideration. But the only inquiry was that, which the circulation of the office paper produced. Is that reasonable and due diligence in such a case? It appears to me a better bargain in the general case to have taken the lower terms from the office than these upon personal security; for, in whatever way their liability is formed, there is a regularity in their transactions, which is the foundation of their credit, and gives a value to their security, which that of individuals will not fetch in the market; if the market price is to determine. The opinions in evidence as to the value are worth nothing in this sense; that they only calculate upon mere age; and take all lives of the same age to be of equal value. I will not say, whether upon the difference in the evidence as to the value it is grossly inadequate within Lord THURLOW's meaning: but it was the duty of the attorney of this lady to get that 14*l.* a year for her, if he could; and it was negligence not to make that inquiry, which any man buying an annuity would have made. If the witnesses agreed, that 50*l.* was enough, that would not be conclusive in favour of the defendant; for the substance of their evidence is, that the life was taken to be good; and the defendant would have failed in this article; that he had not made advantage enough in the article *of her health; as to which he must have been informed. In that respect also there is a failure of due diligence. By that negligence a stranger, if the transaction had been with a stranger, would have profited; and it follows in this Court, that, when you can characterise the conduct as negli-

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gence towards a stranger, by which he obtains an advantage, the attorney becoming purchaser shall not hold that advantage, gained by his negligence. That is the principle, upon which I decide this cause as to Jeyes the younger ; and I am satisfied by this evidence upon the question, whether the defendant is affected by the conduct of Jeyes the younger, that there is no distinction between them ; and the weight of evidence is against the alleged dissolution of partnership. It does appear, that the defendant was unwilling to contract for this annuity. That circumstance disconnects the transaction of December from the sale of the stock in November ; and gets rid of a great deal of imputation.

As to the relief, it cannot go quite to the extent of the prayer. It must be only a decree, that the 400*l.* must be repaid with interest. If I am to conjecture, I do not go the length of saying, this money was brought from London for the purpose of the sale of this annuity. It may be so : but if it is possible it may not be so, I must consider it as converted into an annuity in December, 1798. I cannot therefore charge the defendant to the extent of making him replace the stock ; which would make some difference. The principle, upon which I make the decree, carries the costs with it.

1801.

July 14.

Rolls Court.
GRANT, M.B.

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DANIELL v. DANIELL.

(6 Vesey, 297—300.)

Legacy after limitations for life and in default of children to be paid equally between two persons or the whole to the survivor of them, held not vested till the time of division.

WILLIAM MANTELL by his will, dated the 2nd of October, 1761, reciting his marriage settlement, in pursuance of the power therein gave the whole share and parts of such stock, which he had power to dispose of, to trustees and their heirs, in trust after the decease of his wife, dying without issue by him, to pay his sister Jane Daniell the interest of 1,000*l.* out of the stock during her natural life ; and after her decease the principal or produce of the said 1,000*l.* to be paid to her two sons James Daniell and Francis Daniell, share and share alike, to their own proper use for ever ; in case they should be living at the time of their mother's decease : but, in case either of them should die before their said

mother, then the whole principal or produce of the said 1,000*l.* to be paid to the survivor of them for his own proper use and behoof for ever ; and also to pay his sister Margaret Sunderland the interest of 300*l.* out of the said stock during her natural life ; and her receipt to be a discharge for the same, without the control of her husband ; and the principal or produce thereof after her decease to be paid to her child or children, if more than one, share and share alike ; and also to pay his brother Henry Mantell the interest of 200*l.* for life, and the principal to his children, in the same manner ; but in case Margaret Sunderland and Henry Mantell should die leaving no issue, then to pay the interest of the 300*l.* and 200*l.* to his sister Jane Daniell for life ; and after her decease the principal or produce of the said 300*l.* and 200*l.* to her children share and share alike for their own use for ever : if only one, to that one ; and farther reciting, that he was possessed of *2,100*l.* Bank Stock 4 per cents. 1760, he gave to one of his trustees 100*l.* part thereof, and the residue of the said stock he gave to his said trustees and their heirs ; in trust to pay his mother Jane Mantell the interest of 600*l.* stock, part of the said stock, during her natural life ; and after her decease to pay the said 600*l.* to his said sister Jane Daniell ; and as to the rest of his said stock, in trust for his trustees to pay the interest, dividends, or produce, to his wife Mary Mantell during her life ; and after her decease to his children, to be equally divided between them : but if only one child, then the whole to such child, or to such child or children as she may be with child of, and born after his decease ; but in case his wife shall leave no child or children of his at her decease living, then to pay the interest of 400*l.* part of the said stock, to his sister Margaret Sunderland during her life ; and after her decease the said 400*l.* to be paid to her child or children, share and share alike, if more than one ; and to pay the interest of 1,000*l.* other part of the said stock, to his sister Jane Daniell during her life ; and after her decease the said 1,000*l.* to be paid equally between her said two sons James and Francis Daniell, or the whole to the survivor of them ; declaring his will, that as the said monies are in the East India Stock or Bank Stock, and to avoid dispute, those legacies and trust of payments on the division are to be

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paid in such proportion more or less in the hundred pounds as the said stocks shall at that time produce. He appointed the trustees and his sister Jane Daniell executors.

By a codicil, dated the 26th of January, 1762, the testator gave his sister Jane Daniell 200*l.* to be paid out of his 4 per cent. annuities of 1760 upon the condition following; that his intent and meaning was, that the said 200*l.* should be appropriated to the use of her youngest son Francis, to put him apprentice to such trade as his mother should judge proper; and directed, that his said money should not be paid till the time of his being put out apprentice or to a clerkship: but should he die before being put out apprentice, in that case the testator gave the said sum of 200*l.* in equal shares to his said sisters Jane Daniell and Margaret Sunderland for their use for ever.

[*298] The testator died in 1766. His wife Mary had no children by him. She married Thomas Colby, one of the trustees; and died in 1799. *Margaret Sunderland died in the life of Mary Colby; having never had any issue. Jane Daniell also died in the life of Mary Colby. James Daniell and Francis Daniell were her two only children. Francis died in 1793 intestate, after the death of his mother; leaving Anne Daniell, his widow and administratrix.

The bill was filed by James Daniell, and Robert Hubble, executor of Mary Colby, against the representatives of Thomas Colby, the surviving trustee, and Anne Daniell; praying a transfer to Hubble, as executor of Mary Colby, of 400*l.* 3 per cent. Reduced Annuities, (the stock having been reduced by Act of Parliament) part of the said 1,400*l.* stock, and the dividends accrued since the death of Mary Colby; a transfer of the 1,000*l.* 3 per cent. Reduced Annuities to the plaintiff Daniell, and the dividends since the death of Mary Colby; or in case Francis Daniell took a vested interest in one moiety, then a transfer of one moiety to the defendant Anne Daniell; who, insisting that her husband took a vested interest, claimed 500*l.* of the stock.

A question suggested, that the 400*l.* did not fall into the residue, was given up by the defendants.

Mr. Romilly and Mr. Phillimore, for the plaintiffs:

The only meaning of the words "or the whole to the survivor

of them," under which the plaintiff Daniell claims, is the survivor at the death. The testator speaks of the death of Jane Daniell as happening after the death of his wife; and if both are not living, then he gives it to the survivor of them at that time, at which it was to vest in possession. The 400*l.* not being given after the disposition to the children of Margaret Sunderland must be considered in the event undisposed of.

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Mr. Sutton and Mr. Roper, for the defendants :

As to the 1,000*l.* stock, Francis Daniell having survived his mother was equally entitled with his brother. The best mode of construing that part of the will is to look to other parts, to see what was meant by the word "survivor." He meant, that, if neither should die in the life of the mother, both should be equally entitled : if one should die in the life of the mother, his representatives would not be entitled. The plaintiff's construction, taking any other period, *must stand upon conjecture. There is no reason, why this sum should go to these young men in any other way than the prior sum of 1,000*l.*

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There is no doubt upon either question. First the 400*l.* is clearly undisposed of. As to the 1,000*l.* the only question is, to what period the survivorship relates. There can be no doubt upon that : when we see the limitations, first to the widow for life, then to the children : if no child, then to Mrs. Daniell for life ; then equally between her two sons, or the whole to the survivor of them. It is clear, he meant the survivor at the time of the division. He did not conceive, that would take place, till both his wife and Mrs. Daniell were dead. He conceived, the deaths would happen in the order of the limitations. The mode, in which he disposes of the other sum confirms, instead of opposing, this construction ; shewing, that the period of division was the period, at which he intended it to vest. He had the same meaning as to this fund. He, who is alive, when the division is to take place, takes the whole of the capital ; which must be transferred accordingly to the plaintiff Daniell ; and the 400*l.* Bank Annuities must be transferred to Hubble.

THE MARQUIS TOWNSHEND *v.* STANGROOM.1801.
*July 17, 21.*STANGROOM *v.* THE MARQUIS TOWNSHEND.†

ELDON, L.C.

(6 Vesey, 328—340.)

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Parol evidence admissible in opposition to a specific performance of a written agreement upon the heads of mistake or surprise as well as of fraud; and upon such evidence the bill was dismissed. Another bill for a specific performance of the agreement, corrected according to the same evidence, contradicted by the answer, was also dismissed.

CHRISTOPHER STANGROOM was in possession by lease from the Marquis Townshend of a farm in the parish of Langham, consisting of 446 acres, 3 roods, and 23 perches, at an annual rent of 290*l.* Jane Garrett was tenant of another farm under the Marquis; and those two farms comprised all the lands belonging to the Marquis in that parish. About the end of the year 1796, a treaty commenced between Spearing, agent to the Marquis, and Stangroom, for a renewal of Stangroom's lease; and an agreement, dated the 4th of May, 1797, was signed by Spearing and Stangroom, entitled, "A statement of the quantity of land and annual value of the farm belonging to the Marquis Townshend in Langham, in the occupation of Christopher Stangroom, as proposed to be let upon a lease for twenty-one years from *Michaelmas 1797." This agreement then stated the arable and pasture land particularly, by acres, roods, and perches; in all 425*a.* 1*r.* and 26*p.* "be the same more or less;" that the rent was to be 270*l.* a-year; and expressed some other terms.

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The first bill prayed a specific performance of that agreement; charging, that about the same time an agreement took place with Mrs. Garrett for a renewal of her lease, comprising also a part of Stangroom's farm, about 24 acres; that the defendant Stangroom was aware of that agreement, and of the terms, upon which he was to have his own lease; and that the agreement with Stangroom contains the same quantity of land as a schedule, made out in the presence of Stangroom, and with his assistance from a general map: about 24 acres being deducted from his farm, to be added to Mrs. Garrett's; and 2*a.* 3*r.* 80*p.* being taken from hers to be added to his. Notice to quit was given to both tenants on the 3rd of April, 1797.

† *Jervis v. Berridge* (1873) L. R. 8 Ch. 351.

Stangroom by his answer denied, that he assisted Spearing in making out the schedule from the map; or, that he knew of it. He admitted a proposal, made to him by Spearing about the 29th or 30th of March, or the 1st of April, to take from his farm about 25 acres; and that the rent for the farm he was to have should be 290*l.*; which proposal he refused. He denied any knowledge of Mrs. Garrett's agreement for any part of his farm, or any knowledge of any such intention, except for the exchange of about eight acres; which was proposed by Spearing; and to which the defendant did not object.

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Spearing and another witness, Hammond, proved, that the map was the general standard of the quantity of lands; and was referred to as such by Stangroom and the other tenants; that Stangroom's and Mrs. Garrett's lands were then mixed; and about 24 acres of Stangroom's were convenient for Mrs. Garrett. Spearing also proved an exhibit, the schedule of the farms, referred to by the bill, in his hand-writing, entitled, "The farm in the occupation of Christopher Stangroom at Langham:" the two first sides were written in December, 1796, at Stangroom's house: the third side written afterwards; where, the deponent does not know: but the whole written to ascertain the quantity of land proposed *to be let to Mrs. Garrett; and taken from the map; the two first sides made out with the privity and assistance and in the presence of Stangroom; and the whole communicated to him previously to or at the time of the proposal to her. The third side contained the 24*A.* 3*R.* and 7*P.* proposed to be taken from Stangroom, and 2*A.* 3*R.* 33*P.* to be taken from Mrs. Garrett, and added to Stangroom's farm. Mrs. Garrett's agreement in writing was proved, according to a verbal agreement, stated by Spearing, on the 13th of April, 1797, for a lease for 14 years of 14 score acres, at a rent of 170*l.* He stated, that Stangroom had notice of the verbal agreement. Hammond also proved, that he informed Stangroom of her verbal proposal; and that her written proposals were shewn to him: and a paper was produced in the handwriting of Stangroom, and delivered by him to Hammond, at the end of March, 1797, to be delivered to Mrs. Garrett; stating loosely the extent of Mrs. Garrett's farm; and that she was to have about 20 acres more, and calculating the

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rent she was to pay upon the footing of her verbal agreement. Spearing on his cross-examination denied, that he proposed an exchange of eight acres only; as stated by the answer.

The cross bill prayed a specific performance of the written agreement.

Mr. Lloyd, Mr. Romilly, and Mr. Johnson, for Stangroom, objected to the admission of evidence:

There is no instance, in which an agreement has been varied by parol evidence of conversations. This is not put upon the ground of fraud or misrepresentation. * * In this case all this was treaty antecedent to the execution. To proceed upon the evidence would put an end to the statute.

[The cases cited by counsel are referred to in the judgment.]

Mr. Mansfield, Mr. Richards, Mr. Fonblanque, and Mr. Horne, for the Marquis Townshend:

This is the case of a latent ambiguity, requiring explanation *aliunde*. Each party desires the assistance of the Court. In *Baker v. Painet*† the evidence was admitted; certainly in a case of mistake. Surprise and mistake come very near fraud. If Stangroom is permitted to hold this land, intended to form part of Mrs. Garrett's farm, and made so by the agreement with her, the effect will be fraud. *Joynes v. Statham*‡ is decisive; and according to the established doctrine, that if the Court can be satisfactorily informed, that the agreement is not such as the party thought it was, it shall not be enforced.

The evidence was read without prejudice. The case was then argued upon the effect of the agreement and the evidence: the plaintiff in the original cause contending, that the agreement clearly referred to the quantity of land by acres, roods, and perches; and the words "be the same more or less" meant only, that they did not warrant the measure; and the description of lands in the occupation of Stangroom was satisfied, with that restriction; and did not necessarily mean all the lands in his

† 1 Ves. Sen. 456.

‡ 3 Atk. 388.

occupation; and that it would be impossible to enforce Stangroom's agreement literally, particularly against Mrs. Garrett.

For the plaintiff in the cross bill it was insisted, that there was no ambiguity in the agreement. The farm in the occupation of Stangroom was intended to be let. The words "be the same more or less" shewed, the parties meant to be bound by the description of the person, not of the quantity of land. Those words must refer to all the preceding items: and might answer twenty acres; as they would without doubt a less quantity; though not, if it was considerable. Upon the other construction those words are useless. The treaty was completely at an end by the notice to quit. The evidence does not amount to the assertion, that Stangroom ever agreed; and all the conversations were antecedent to the date of the agreement.

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LORD CHANCELLOR:

The argument of these causes certainly furnishes questions of great importance, as well as some difficulty. It is contended by the original bill, that it is competent to the Court to make a decree against Stangroom upon all the circumstances and the written paper. He insists by his cross bill, that he is not bound to execute such an agreement: or rather, that it is not the true sense of the agreement; that he has an agreement in his possession, entitling him to a lease for twenty-one years of all the lands in his occupation; stating the true meaning to be a lease of his old farm; and, that agreement being obtained without fraud, no evidence is to be admitted to vary the sense of it; and that upon no other principle than that founded upon the rules of evidence in this Court, as applying to the circumstances and his conduct can the Court look at the parol evidence, even for the purpose of refusing him a specific performance of his contract: much more strongly contending, that the Court cannot enforce against him a contract, the subject of which will not correspond with the description, being only a part of it; and attempting to add another property; which upon no practicable construction of any words in the written agreement can be said to be comprehended in it.

Upon the question as to admitting parol evidence, it is perhaps

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impossible to reconcile all the cases. *Lord Irnham v. Child*† went upon an indisputably clear principle; that the parties did not mean to insert in the agreement a provision for redemption; because they were all of one mind, that it would be usurious; and they desired the Court, not to do what they intended, for the insertion of that provision was directly contrary to their intention, but they desired to be put in the same situation, as if they had been better informed, and consequently had a contrary intention. The answer is, they admit, it was not to be in the deed; and *why was the Court to insert it; where two risks had occurred to the parties: the danger of usury, and the danger of trusting to the honour of the party. The same doctrine was laid down in *Lord Portmore v. Morris*,‡ and in *Hare v. Shearwood* § by Mr. Justice BULLER; and, speaking with all the veneration and respect due to so great a judicial character, the point, in which it seems to have failed, is, that he thought too confidently, that he understood all the doctrine of a court of equity. It cannot be said, that because the legal import of a written agreement cannot be varied by parol evidence, intended to give it another sense, therefore in equity, when once the Court is in possession of the legal sense, there is nothing more to inquire into. Fraud is a distinct case, and perhaps more examinable at law; but all the doctrine of the Court as to cases of unconscionable agreements, hard agreements, agreements entered into by mistake or surprise, which therefore the Court will not execute, must be struck out, if it is true, that, because parol evidence should not be admitted at law, therefore it shall not be admitted in equity, upon the question, whether, admitting the agreement to be such as at law it is said to be, the party shall have a specific execution, or be left to that Court, in which, it is admitted, parol evidence cannot be introduced. A very small research into the cases will shew general indications by Judges in equity, that that has not been supposed to be the law of this Court. In *Henkle v. The Royal Exchange Assurance Company*,|| the Court did not rectify the policy of insurance; but they did not refuse to do so upon a notion, that, such being the legal effect of it, therefore

† 1 Br. C. C. 92.

‡ 2 Br. C. C. 219.

§ 3 Br. C. C. 168.

|| 1 Ves. Sen. 317.

this Court could not interfere; and Lord HARDWICKE says expressly, there is no doubt, the Court has jurisdiction to relieve in respect of a plain mistake in contracts in writing as well as against frauds in contracts: so that, if reduced into writing contrary to the intent of the parties, on proper proof that would be rectified. This is loose in one sense; leaving it to every Judge to say, whether the proof is that proper proof, that ought to satisfy him; and every Judge, who sits here any time, must miscarry in some of the cases, when acting upon such a principle. Lord HARDWICKE saying, the proof ought to be the strongest possible, leaves a weighty caution to future Judges. This inconvenience belongs to the administration of justice; that the *minds of different men will differ upon the result of the evidence; which may lead to different decisions upon the same case. In *Lady Shelburne v. Lord Inchiquin*† it is clear, Lord THURLOW was influenced by this, as the doctrine of the Court; saying, it was impossible to refuse, as incompetent, parol evidence, which goes to prove, that the words taken down in writing were contrary to the concurrent intention of all parties: but he also thought, it was to be of the highest nature; for he adds, that it must be irrefragable evidence. He therefore seems to say, that the proof must satisfy the Court, what was the concurrent intention of all parties; and it must never be forgot, to what extent the defendant, one of the parties, admits or denies the intention. Lord THURLOW saying, the evidence must be strong, and admitting the difficulty of finding such evidence, says, he does not think, it can be rejected as incompetent.

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I do not go through all the cases; as they are all referred to in one or two of the last. In *Rich v. Jackson*‡ there is a reference to *Joynes v. Statham*, and a note of that case preserved in Lord HARDWICKE's manuscript. He states the proposition in the very terms; that he shall not confine the evidence to fraud th it is admissible to mistake and surprise; and it is very singular; if *the Court will take a moral jurisdiction at all, that it should not be capable of being applied to those cases; for in a moral view there is very little difference between calling for the execution of an agreement obtained by fraud, which creates a surprise upon

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† 1 Br. C. C. 338.

‡ 4 Br. C. C. 514.

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the other party, and desiring the execution of an agreement, which can be demonstrated to have been obtained by surprise. It is impossible to read the report of *Joynes v. Statham*,† and conceive Lord HARDWICKE to have been of opinion, that evidence is not *admissible in such cases; though I agree with Lord ROSSLYN, that the report is inaccurate. Lord ROSSLYN expressly takes the distinction between a person coming into this Court, desiring, that a new term shall be introduced into an agreement, and a person admitting the agreement, but resisting the execution of it by making out a case of surprise. If that is made out, the Court will not say, the agreement has a different meaning from that, which is put upon it; but supposing it to have that meaning, under all the circumstances it is not so much of course, that this Court will specifically execute it. The Court must be satisfied, that under all the circumstances it is equitable to give more relief than the plaintiff can have at law; and that was carried to a great extent in *Twining v. Morrice*.‡ In that case it was impossible to impute fraud, mistake, or negligence: but Lord KENYON was satisfied, the agreement was obtained by surprise upon third persons; which therefore it was unconscientious to execute against the other party interested in the question. It had been decided frequently at law, that there could be no such thing as a puffer at an auction. That, whether right or wrong, has been much disputed here. In that case we contended, that all the parties in the room ought to know the law. Lord KENYON would not hear us upon that; and I do not much wonder at it: but Blake being the common acquaintance of both parties, and having no purpose to bid for the vendor, unfortunately was employed to bid for the vendee; and others, knowing, that he was generally employed for the vendor, thought, the bidding was for him. Lord KENYON said, that was such a surprise upon the transaction of the sale, that he would leave the parties to law; and yet it was impossible to say, that the vendee appointing his friend, without the least notion, much less intention, that the sale should be prejudiced, was fraud, surprise, or any thing, that could be characterised as morally wrong. That case illustrates the principles, that circumstances of that sort

† 3 Atk. 388.

‡ 2 Br. C. C. 326.

would prevent a specific performance; and that it is competent to this Court, at least for the purpose of enabling it to determine, whether it will specifically execute an agreement, to receive evidence of the circumstances, under which it was obtained; and I will not say, there are not cases, in which it may be received, to enable the Court to rectify a written agreement, *upon surprise and mistake, as well as fraud: proper, irrefragable, evidence, as clearly satisfactory, that there has been mistake or surprise, as in the other case, that there has been fraud. I agree, those producing evidence of mistake or surprise, either to rectify an agreement, or calling upon the Court to refuse a specific performance, undertake a case of great difficulty: but it does not follow, that it is therefore incompetent to prove the actual existence of it by evidence.

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The conclusion upon this case is, that I can give relief upon neither bill. I will not say, that upon the evidence without the answer I should not have had so much doubt, whether I ought not to rectify the agreement, upon which Stangroom relies, as to take more time to consider, whether the bill should be dismissed. But the evidence must be taken, due regard being had to the answer; and the Court is not to decide upon the allegation as to the probability against the answer, not only to take out of his contract part of the land he held, but to insert land, which he never did hold, and of which he states he never did agree to become the occupier. Though I admit all the observations upon the depositions, stating the communication to Stangroom by Spearing of the third side of the paper, produced in evidence, it is clear upon all the other circumstances, that Stangroom knew prior to that agreement, that there had been treaty with Mrs. Garrett to let her have the land described in the third side of that paper. A most material fact is, that Stangroom admits, that upon the 29th or 30th of March, or the 1st of April, Spearing proposed to him, that his farm should be varied. It is said, he objected to that proposition: but he admits, that at that time Spearing delivered to him a paper, which corresponds in most if not all, its parts with the agreement of the 4th of May. If that paper amounts to a proposition, that he was not to have his old farm, and it corresponds with the paper of the 4th of May, and

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Spearing executed that paper with the notion, that it demised, what he proposed to demise upon the 29th or 30th of March, or the 1st of April, the other taking it as not demising what was proposed at the prior time, there cannot be a stronger case of surprise; with this additional fact, that before the execution of the agreement Mrs. Garrett represented, that the bargain proposed to her was hard. She was to have more lands in this parish. Where was *she to get more, but out of the occupation of Stangroom; all the lands in that parish being let between them? He sends her word, that she is to have the additional quantity. What is that but saying, that he was to give up so much; for it could be procured from no other quarter? Recollecting also, that the map was in his possession, was referred to, and was something to amend by, that it gave map quantities, and the papers were reformed as to their quantities by that map, furnishing 446 acres, as the quantity in the possession of Stangroom, and 425, as the quantity proposed to be in his possession, the latter made up by reduction of 24 acres and the addition of three, it is impossible, taking all this together, to prove, that it was the intention of the parties, that if those two treaties were carried into effect, he should have the whole. It appears, that Spearing managing for his landlord, and these tenants doing the best for themselves, had not come to an agreement up to the 1st of April. Then notice to quit was given to both. That is said to be a determination of all treaty. It is put on the other side as speeding the business. Steps are taken directly; and Mrs. Garrett makes her agreement by parol upon the 13th of April; the effect of which is to give her the benefit of that part of the treaty, which was to take from Stangroom that part of his farm. That agreement was communicated to Stangroom. He knew, she had a parol agreement, perhaps not strictly one, that, even if confessed, would have bound, but an agreement, that in all honour, conscience, and fair dealing, ought to bind; she relying upon the honour of her landlord, that she was to have that property in her occupation, which Stangroom himself had advised her to take. The subsequent agreement with Stangroom does away the effect of the notice to quit.

The question therefore is, whether upon the face of the agree-

ment connected with a latent circumstance, now disclosed, you are now at liberty upon the latent fact disclosed to inquire into the nature of the agreement itself; if there is something upon the face of it inconsistent with that fact disclosed: whether evidence can be admitted upon the ground of that fact disclosed; one part of the agreement importing what the other part does not import: next, whether if Stangroom really understood, he was to have the whole of his old farm, he shall have a specific execution; if the other party could not so understand it. As to the expression **“more or less,”* I do not say, those words in a contract will not include a few additional acres: but if the parties are contending about three acres, it would be very singular upon those words to add twenty-four map acres; which he knew were already demised, as far as parol could demise them, to Mrs. Garrett. It is almost impossible that he could mean to include them. Therefore upon the head of the true meaning of the agreement, I think the parol evidence may be introduced: but, without determining that, the evidence is so complete to shew, Spearing did not mean it at the time of the agreement, and that Stangroom must have known, that he could not mean it, that he is therefore to be left to law.

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As to the other part of the case, I cannot possibly execute an agreement so perfectly different from that Stangroom has signed. I am to consider it with reference to his answer; by which he has positively denied it. The whole agreement is to be taken together; and the whole must be executed or abandoned. I cannot find out, what was the parcel of land in the possession of Mrs. Garrett, that he was to have. It is not distinctly stated: nor is it admitted. I cannot therefore give a specific performance upon that bill; and under all the circumstances with regard to the admission of evidence, attending to the purpose and the view, with which it is to be admitted in this Court, both bills must be dismissed, without costs, on account of the inaccuracy of all the transactions.

1801.
July 17, 22.

ELDON, L.C.

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BARRINGTON *v.* TRISTRAM.

(6 Vesey, 345—349.)

A bequest for all and every the child and children of A. includes every child born before the period of distribution; which in this case was the attainment of the age of twenty-one by the eldest, the marriage of a daughter, or the death of a child under twenty-one, leaving issue. Upon the general rule a child by a subsequent marriage was included, notwithstanding a strong implication in favour of children by the prior marriage.

Dividends on specific legacy of stock from the death of the testator.

Costs of a doubt upon the meaning of the will out of the general property.

ADMIRAL BARRINGTON by his will, dated the 22nd of February, 1797, after devising his real estate, and disposing of a leasehold house, and the furniture, &c., gave and bequeathed to his nephew Barrington Price 10,000*l.* 3 per cent. Consolidated Bank Annuities, part of his stock in that fund; which he directed to be transferred to his said nephew for his own use and benefit within one month after the testator's decease: but if his said nephew should happen to die in his life-time, then the testator directed, that his executor should stand possessed of the said 10,000*l.* 3 per cent. Bank Annuities upon trust for all the children of the said nephew Barrington Price lawfully begotten, which shall be living at his decease, or born in due time afterwards, in equal shares, if more than one; to be transferred to a son or sons at the age of twenty-one, and to a daughter or daughters at the like age, or marriage with consent of the executor; the dividends to be in the mean time applied for maintenance and education; with survivorship in case of the death of any one or more dying before twenty-one or marriage without leaving any child or children; if leaving any, upon trust for the child or children, in the same manner; and if Barrington Price should die in the testator's life, leaving only one child living at his decease, or born in due time afterwards, or if more, all but one should die before becoming entitled to any share, and without leaving issue, upon trust for such one; and if Barrington Price should die in the testator's life without leaving any child or children living at his decease or born in due

time afterwards, or if any, they, their child, children, or issue, should die before becoming entitled to the said stock as a vested interest, then the same to fall into the residue, and go to his nephew George Barrington, residuary legatee and executor. BARRINGTON
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After several other legacies the testator gave to the plaintiffs the sum of 5,000*l.* part of his stock of and in the 3 per cent. Bank Annuities; upon trust for and for the benefit of all and every the child and children of his niece Mrs. Tristram, the wife of the Reverend Thomas Tristram, if more than one, in and by equal parts or shares; and to be vested interests in, and transferred to, *such of them as should be a son or sons, as or when he or they should attain his or their age or ages of twenty-one years respectively, and in and to such of them as should be a daughter or daughters at the like ages, or upon his or their marriage or marriages before such age with consent of the plaintiff, or the survivor, his executors, &c.; and he directed, that the dividends thereof, or such part or parts thereof, and so much as the plaintiff should think fit, should be in the meantime applied for the maintenance and education of the children of his said niece Mrs. Tristram during their respective minorities, without any regard to the ability of their father, or his situation or circumstances in life; but if any of the children of the said Mrs. Tristram, being a son or sons, should die before the age of twenty-one, or, being a daughter or daughters, before that age, not having been married with such consent, and without leaving any issue then living, then the expectant parts or shares of such children so dying before being vested of and in the said 5,000*l.* 3 per cent. Annuities should go or accrue to, and be upon trust for the benefit of the surviving children of the said niece Mrs. Tristram, if more than one, in equal shares; and should be vested interests in, and transferred to, each of them respectively at the like ages or times as the original shares; and the dividends of such surviving shares should be in the meantime applied for the maintenance and education of such surviving children during minority; but if any of the children of his said niece Mrs. Tristram, son or daughter, sons or daughters, should die before twenty-one, leaving any child or children, the share of every such child so dying under age, and leaving issue, should be upon

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BARRINGTON ^{r.} TRISTRAM trust, for the benefit of his, her, or their child or children, if more than one, in equal shares; and should be vested interests in, and transferred to, each of them respectively at the like ages or times, or upon the marriage of such of them as should be a daughter or daughters, with like consent as before directed respecting the shares of the child or children of the said niece Mrs. Tristram, and with the same survivorship as before, in case of such child dying under twenty-one and without issue, as aforesaid; and that the dividends, &c. of the last-mentioned shares should be applied for the maintenance and education of such last-mentioned child, &c. during minority; and if all the children of his said niece Mrs. Tristram, except one, should die, before he, she, or they, should become entitled to any part of the said 5,000*l.* *Annuities by virtue of that his will, and without leaving any issue, as aforesaid, then and in that event he gave the whole upon trust for such only surviving child; and directed, that it should be transferred to such child, if a son at twenty-one, if a daughter, at that age, or marriage with such consent, as before: but if all and every the child and children of his said niece Mrs. Tristram should die, before they or any of them should become entitled to the said 5,000*l.* 3 per cent. Bank Annuities as a vested interest, and without leaving any child or children, which should live to become entitled thereto, as a vested interest, then and in that event he gave the said 5,000*l.* Bank Annuities upon trust for all the children of the said Barrington Price, which shall be living at the decease of the surviving child of his said niece Mrs. Tristram, in the same manner as directed concerning the said 10,000*l.* Bank Annuities; and if none of the children of Barrington Price or their issue should live to become entitled, the said 5,000*l.* stock to fall into the residue.

The testator died soon after the execution of his will. Thomas Tristram died, according to one witness, in 1796; leaving six children by his wife. She married again, and by that marriage had one child, Louisa Jane Cooke. That child claiming a share, and the Tristrams claiming the whole, as the only children living at the death of the testator, the bill was filed by the trustees to have the different rights ascertained.

Mr. Alexander, for the family of Tristram :

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It was originally held in the cases, that a general bequest of this sort applied only to the description of persons at the death of the testator at farthest : but some late cases have let in persons answering the description before the distribution. That construction, which would let in the child by the second marriage, would make a considerable part of this disposition impossible. The question is, whom the testator meant by the child or children of his niece Tristram. If the construction is extended to a child coming *in esse* after the death of the testator, you may extend it under this will, so as to give to the children of that child a proportion of the fund at the age of twenty-one ; which is extending the vesting beyond the period allowed by law : a difficulty, that cannot occur if it is understood children born at the death of the testator. The *Court will incline to that meaning, that will meet all the events, that can happen.

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Mr. Sutton and Mr. Owen, for the defendant Cooke :

This is merely a question of intention. The rule, that all children are let in, until there must be a distributive share given to one, must govern this case. Suppose, all the children by the first husband died, before the money was distributable : is the bounty, evidently intended as a provision for the children of his niece, to lapse ? The Court will not incline to such a construction. The difficulty suggested must be considered, when the case arises : but one eventually bad limitation in a will does not of necessity govern the construction. Tristram, the father, appears to have been dead when the will was made. They cited *Andrews v. Partington*, 3 Br. C. C. 401, *Middleton v. Messenger*, *ante*, p. 1.

LORD CHANCELLOR :

The rule of the Court now being to let in all children, until there must be a distributive share given to one, the construction upon the whole of this will seems to be, that every child must be let in, until some child attains twenty-one, or dies, leaving issue. The first attaining twenty-one must be paid his share, and then it must be apportioned ; unless some other prior event would

BARRINGTON ^{r.} TRISTRAM. compel you to fix the shares. The rule of the Court has gone upon an anxiety to provide for as many children as possible with convenience. Therefore any coming *in esse*, before a determinate share becomes distributable to any one, is included. My private opinion is, he never thought of his niece marrying again; but the object was the children of Mr. Tristram. The words "the wife of the Reverend Thomas Tristram" are merely words of description. In the direction for maintenance, without regard to the ability of their father, I should suppose, he thought Mr. Tristram was alive, and that he meant him: but the words are not so; and if the rule is to include all children coming *in esse*, before there must be a distributive share given to one, the words "their father" in that passage are not sufficient to support my private opinion against the rule. In the gift over he excludes children of Barrington Price, that should not be living *at the death of the surviving child of Mrs. Tristram. There too, I think, he meant children by Mr. Tristram: but it would be very difficult to make out the title of the children of Barrington Price against her children by any other husband. The difficulty put by *Mr. Alexander* confirms my private opinion: but the rule requiring, that all the children shall take, who come *in esse*, before there is a necessity for determining the share of any child, it only comes to this: that the testator has given to persons, whom the law makes certain, property, with a limitation over, which cannot take effect; which happens everyday. Notwithstanding a strong conjecture against my judicial opinion, I am bound to declare, that every child of Mrs. Tristram shall take, who will come into existence before any son of Mrs. Tristram attains the age of twenty-one, or any daughter attains that age, or marries, or any child marries, and dies, leaving issue; for a child may marry, and die under twenty-one, leaving issue. Decree, that the stock shall be transferred to the *Accountant-General*, and the costs of all parties paid out of the residue. Wherever a testator by his will raises a doubt upon the meaning of it, his general property pays for settling that doubt. This being a specific legacy of stock, the dividends are due for maintenance from the death of the testator.

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PAINE *v.* MELLER.†

(6 Vesey, 349—353.)

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July 22.

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Contract for the sale of houses; which from defects in the title could not be completed on the day. The treaty however proceeded upon a proposal to waive the objections upon certain terms. The houses being burnt before a conveyance, the purchaser is bound, if he accepted the title; and the circumstance, that the vendor suffered the insurance to expire at the day, on which the contract was originally to have been completed, without notice, makes no difference. A reference to the Master was therefore directed to inquire, whether the proposal was accepted, or acquiesced in, on behalf of the purchaser.

UPON the 1st of September, 1796, the plaintiffs sold to the defendant by auction some houses in Ratcliffe Highway, upon the usual terms, a deposit of 25*l.* per cent. and a proper conveyance to be executed upon payment of the remainder of the purchase-money at Michaelmas next. The premises were with others subject to certain annuities: but a trust of stock was declared for the payment of these annuities. The first abstract delivered was clearly defective: so that the purchase could not be completed at *the time. A farther abstract was delivered to the solicitor for the defendant at the end of September or the beginning of October. He insisted upon having a release from the annuitants. The treaty continued through October; and about the end of that month the defendant's solicitor agreed to waive all objections, if the plaintiff would allow him eleven guineas, and if the trustees of the stock would join in the conveyance; and refused a proposal to give up the purchase. The plaintiff agreed to make the allowance desired. On the 4th or 5th of November the defendant's solicitor sent a draft of a conveyance. The trustees of the stock were prevailed upon to join in the conveyance by a new declaration of trust. The draft was returned to the defendant's solicitor: the deeds were engrossed; and upon the 16th or 17th of December he declared himself satisfied with the title; and said, the deeds would be ready in two or three days; and that he should complete the purchase under the promise of the eleven guineas. Upon the 18th of December, the houses were burnt: the insurance having been

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† *Rayner v. Preston* (1880-81), 18 Ch. D. 1, 9, 50 L. J. Ch. 472.

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suffered to expire at Michaelmas, 1796. On the 20th of December the defendant's solicitor wrote a letter; observing, that he had taken an objection to the freehold title; and should not have thought any thing more of the purchase but for the covenant of indemnity from the trustees, inserted in the draft by him, and approved by one of the trustees of the stock: but as that had been struck out by another trustee, he could not advise his client to accept the title; and he should call for the deposit.

The bill was then filed; praying a specific performance of the contract; and a decree was made by the late LORD CHANCELLOR, simply referring it to the Master, to see, whether a good title could be made. This decree was dissatisfactory to both parties, as not deciding the question; and a petition of re-hearing was presented by the plaintiff.

Mr. Mansfield and *Mr. Cox*, for the plaintiff, insisted, that the objection to the title from the charge of the annuities was frivolous: there being a fund of stock with a trust declared upon it.

Mr. Sutton and *Mr. Lewis*, for the defendant:

[*351] The delay in performing this contract arose from the defect of the title; and the plaintiff ought to have acquainted the defendant with the *circumstance of the insurance expiring. In *Stent v. Baylis*,† referred to in *Mortimer v. Capper*,‡ Sir JOSEPH Jekyll expresses a clear opinion upon this case.§ *Pope v. Roots*.||

Mr. Mansfield, in reply:

All the cases referred to are got rid of by *Jackson v. Lerer*.¶ The former cases proceeded upon this fallacy, that the party could not have the thing bought; for chance had decided against him: but he had the chance; and he must take it each way. In the case of a life it might last fifty years, and might drop the next day. But this is not a purchase of property depending

† 2 P. Wms. 217.

‡ 1 Br. C. C. 156.

§ 2 P. Wms. 220.

|| 7 Br. P. C. 184.

¶ 3 Br. C. C. 605.

upon the contingency of life, like an annuity. A man purchasing a house is to consider with himself whether he will insure, or not. Not a word was said about insurance: therefore notice was not incumbent on the plaintiffs; and there was as much negligence in the defendant in not inquiring about that. Such an accident did not occur to either of them. If in the sale of a house nothing is said about insurance, it could not enter into the bargain.

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LORD CHANCELLOR :

The abstract first delivered was undoubtedly imperfect in certain respects. It did not go back farther than forty-three years; and there was no specific mention of the property in Ratcliffe Highway in the abstract. There was also the objection upon the annuities. Unquestionably that abstract was not satisfactory; and the express condition of the sale could not be complied with. Of course the defendant could not be called on to pay his purchase money. Then it was with the vendee to choose to go on with the bargain or to put an end to the contract. The agent however chose not to put an end to it: and though a circumstance took place at Michaelmas sufficient to put an end to any action of law, the contract was kept alive, at least to the 10th of December. It is clear, the objection was given up as to the freehold title; and the only difference was as to the indemnity against the annuities, affecting these with other premises. I do not consider, whether this objection is of form or substance: but leave it to be determined, when it may be necessary, whether the purchaser under such circumstances has not a right to insist, that *the annuitants shall release the premises; or, whether this Court will say, under all the circumstances the purchasers shall take the premises burthened with the annuities with a great number of others; and seek their indemnity against the trust property and the trustees; if they preferred a personal covenant by the trustees. If in equity these premises belonged to the vendee, he would have a title to the rents and profits at Michaelmas by relation; and he must pay the purchase money with interest from that time. First, it is said, the title was never accepted in fact: 2ndly, if not, under these circumstances a court

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of equity will not compel a specific performance. As to the second point the objection is grounded upon two circumstances: 1st, the simple fact of the fire; 2ndly, that the premises had been insured prior to the contract; that that fact and the fact, that the insurance expired at Michaelmas, 1796, were not disclosed; and that the premises afterwards remained uncovered by any insurance. The authority of Sir JOSEPH JERRELL has been mentioned: but no case has been cited in support of that *dictum*; and it is in a degree suggested, not admitted at the Bar, that it may be considered overruled by subsequent cases. As to the mere effect of the accident itself no solid objection can be founded upon that simply; for if the party by the contract has become in equity the owner of the premises, they are his to all intents and purposes. They are vendible as his, chargeable as his, capable of being incumbered as his; they may be devised as his; they may be assets; and they would descend to his heir. If a man had signed a contract for a house upon that land, which is now appropriated to the London Docks, and that house was burnt, it would be impossible to say to the purchaser, willing to take the land without the house, because much more valuable on account of this project, that he should not have it. As to the annuity cases and all the others, the true answer has been given; that the party has the thing he bought; though no payment may have been made; for he bought subject to contingency. If it is a real estate, he of course has it. Then as to the non-communication, I cannot say, that in my judgment forms an objection; for I do not see, how I can allow it, unless I say, this Court warrants to every buyer of a house, that the house is insured, and not only insured, but to the full extent of the value. The house is bought, not the benefit of any existing policy. However general the practice of insuring from fire is, it is not universal; and it is yet *less general that houses are insured to their full value, or near it. The question, whether insured or not, is with the vendor solely, not with the vendee; unless he proposes something upon that; and makes it matter of contract with the vendor, that the vendee shall buy according to that fact, that the house is insured. I am therefore of opinion, that if the agent on behalf of this purchaser did accept this title previously to the

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destruction of the premises, the vendors are in the situation, in which they would have been, if the title and the conveyance were ready at Michaelmas, 1796, but by the default of the vendee were not executed, but the title was accepted, and the premises were burnt down on the quarter day. As to the fact, where there has been a great deal of treaty, and a considerable hardship must fall upon one party, if the case is to be put entirely upon the fact, the Court must guard against surprise; and I am not sure, even the plaintiff's witnesses accurately understand the nature of the facts they depose to. It is to be observed, they are all the plaintiff's agents, subject to the influence necessarily belonging to that situation. The case is therefore not sufficiently clear upon the fact; and there ought to be some reference to the Master or an inquiry before a jury: but that must not be upon the validity of the title; for it is clear, the objection to the freehold title, that it was not old enough, and the other objection, that the purchaser had a right to insist upon a release of the annuities, were waived. The question between them is, whether the parties agreed, that an indemnity should be given in any form; and if so, in what form. The inquiry must be, whether the title had been accepted by the agent on behalf of the defendant on or before the 18th of December, 1796. That inquiry will miscarry, unless the Master or the jury, if satisfied, that there was an acquiescence in the proposal, shall be of opinion, that is an acceptance of the proposal. I should think, a court of law would hold that: but if there is any doubt of it, I would rather refer it to the Master to inquire, whether the agent on behalf of the defendant had accepted or acquiesced in the proposal; with a direction, that he should be examined; and they will appreciate the credit due to him; and will not forget, that he was bartering for himself for eleven guineas; if that appears.

The decree was reversed;

And the reference to the Master directed accordingly.

CODRINGTON *v.* LORD FOLEY.LORD FOLEY *v.* CODRINGTON.†

(6 Vesey, 364—385.)

1801.

*June 9, 12.**July 14, 27.*

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Portion raised out of a reversionary term. The rule is, that it depends upon the particular penning of the trust and a fair construction of the whole instrument as to the intention.

Upon a limitation to the parent for life with a term to raise portions at twenty-one or marriage, if there is nothing more, and the interests are vested, and the contingencies have happened, at which the portions are to be paid, upon the general rule the interest is payable. and the portions must be raised by sale or mortgage of the term.

LORD FOLEY by his will, dated the 19th of June, 1777, after in the first place directing, that all his worldly estate should be subject to the payment of his debts, funeral expenses, legacies and annuities, gave and devised the capital messuage, called Great Witley, and all other the messuages, manors, lands, tenements, and hereditaments, late belonging to Thomas, Lord Foley, deceased, which he (the testator) was entitled to under his lordship's will, or otherwise, in the counties of Worcester, Stafford, Middlesex, Salop, and Hereford, (except the manor of Malvern, and certain other premises therein after otherwise devised), whether freehold, leasehold, or copyhold, subject nevertheless to the charge thereafter mentioned for making up the deficiency, if any should arise in paying his legacies therein mentioned, to and to the use of his brother Robert Foley and Abraham Turner, their executors, &c. for the term of ninety-nine years, to commence from the testator's decease, without impeachment of waste; and from and after the end, expiration, or other sooner determination, of the said term, to the use of his eldest son Thomas Foley for life; remainder to trustees to preserve contingent remainders; and from and after his decease to the use of other trustees for 100 years, to commence from his decease; in trust for raising a jointure for any wife or wives he should marry, out of any part of the annual rents, issues, and profits, of the said manors, &c. not exceeding the yearly value of 2,000*l.*, or an annuity or rent-charge, not exceeding the yearly value of 1,500*l.* clear of all deductions; and to pay the same half

† *Lawton v. Ford* (1886) L. R. 2 Eq. 97, 105.

yearly on the 25th of March and 29th of September: the first payment to be made on which of those days shall first happen next after the decease of Thomas Foley; and from and after the end, expiration, or other sooner determination, of the said term of 100 years, and subject thereto, to the use of other trustees, their executors, &c. for a term of 1,000 years, to commence from the day of the decease of his said son Thomas Foley; in trust by and out of the rents, issues, and profits, of the same manors, messuages, lands, tenements, and hereditaments, or by sale or mortgage *thereof, or of a competent part thereof, or by other ways and means, to levy and raise any sum or sums of money not exceeding in the whole the sum of 30,000*l.* for and towards the portion and provision of all and every the younger child and children of the said Thomas Foley, for such estates, in such proportions, under such restrictions, and to be paid to him, her, or them, at such time and times, and with such interest or maintenance, as the said Thomas Foley should by any deed, will, or appointment, by him to be executed in the presence of two or more witnesses, limit, declare, or appoint; and for want of such limitation, declaration, or appointment, to be equally divided between them, if more than one, share and share alike; and from and after the end, expiration, or other sooner determination, of the said term of 1,000 years, and subject thereto, to the use of the first and other sons of the said Thomas Foley in tail male; with remainders to the use of Edward Foley, the testator's second son, and his first and other sons, and Andrew Foley, his third son, and his first and other sons, in strict settlement; with the like powers to his said sons of making jointures and charging portions; with similar remainders to the daughters of the testator and their sons successively; and then to the daughters of his sons and daughters respectively, as tenants in common; remainder to his brother in tail; remainder to his sister in fee.

The testator then declared his will to be, that all the messuages or tenements, which he held by lease from the trustees or devisees of the late Countess Dowager of Oxford in the county of Middlesex, should go and be enjoyed by his said trustees and such person and persons, upon such conditions, uses, trusts, intents, and purposes, as the said manor of Witley and other the

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 LORD FOLEY. estates of the said Thomas Lord Foley deceased therein before limited, as far as the nature thereof would admit; and he gave all other the leasehold estates, late of the said Thomas Lord Foley, which he (the testator) was entitled unto by virtue of his lordship's will, to Robert Foley and Abraham Turner, their executors, &c. for and upon the same uses and purposes as the manor of Witley and other the estates of the said Thomas Lord Foley, as therein before limited, or as near as by the tenure thereof the same could be limited; with the power of renewing such of the said leases as were renewable.

[366] The testator then devised other estates in the county of Hereford, to Robert Foley and Abraham Turner, their executors, &c. for a term of 101 years, to commence from the day of his decease, without impeachment of waste; and after the end, expiration, or other sooner determination, of that term, and subject thereto, to Edward Foley for life; remainder to trustees to preserve contingent remainders; remainder to trustees for 102 years, to commence from his decease, without impeachment of waste, in trust for raising a jointure of 1,200*l.* a-year out of the annual rents, issues, and profits, &c. (as expressed in the limitations of the other estates to the eldest son); and from and immediately after the end, &c. of that term, to trustees for 500 years, to commence from the death of Edward; in trust by the ways and means aforesaid, or by any other ways and means to levy and raise portions, not exceeding 10,000*l.* for his younger children, for such estates, in such portions, under such restrictions, and to be paid at such times, as Edward Foley should by deed or will appoint; and for want of appointment equally; and from and after the end or other determination of that term to his first and other sons in tail male; with similar remainders to Andrew and his sons and Thomas and his sons successively; and then to the daughters of the testator, &c.

The testator devised other estates to the use of his son Andrew for life; remainder to trustees to preserve contingent remainders; remainder to trustees for ninety-eight years to commence from his decease, without impeachment of waste; in trust for raising an additional increase of jointure for his present or any after-taken wife, out of all or any part of the annual rents,

issues, and profits, &c. (as in the other limitations) not exceeding 400*l.* a-year; and from and immediately after the end or other sooner determination of that term, and subject thereto, to trustees for 999 years, to commence from the decease of Andrew Foley; in trust by the ways and means aforesaid, or by any other ways or means to levy and raise any sum, not exceeding 10,000*l.* for and towards the additional portion of his younger children, for such estates, &c. (as in the limitations to Edward); and with similar remainders to his first and other sons, and Edward and Thomas and the testator's daughters, and their sons respectively, &c.

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The trusts of the terms of ninety-nine years and 101 years were declared to be, that the said Robert Foley and Abraham Turner, and the survivor, &c. should take the rents, issues, and profits, of all the manors, &c. and cut timber and underwood as they shall think proper, not exceeding 3,000*l.* in one year; and out of those funds and the rents, &c. in the first place according to their will and pleasure, and not otherwise, allow yearly or oftener to or for the use of his sons Thomas and Edward Foley any sum or sums of money, not exceeding in the whole in any one year 6,000*l.*, until such of their debts as were then provided for and should be due at his decease should be discharged; and in the next place to pay and discharge a mortgage, and all such of the debts of his said two eldest sons and the interest due thereon respectively as in any schedule or schedules annexed to his said will, or in any other schedule or schedules, by him hereafter to be made and subscribed, should be contained; or as they, his said trustees, in their judgment and discretion should think fit and expedient; but so as that neither his said sons nor their creditors should have any interest in or power over the estates; and after the decease of his said sons, and payment of the debts, &c. the terms to attend the inheritance.

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The will then contained provisions, that in case of the death of his eldest son without issue male, Edward and his sons should take the estates devised to him; and Andrew and his sons all the other estates, except some devised to be sold; and that the portions, legacies, &c. under the will should be in satisfaction for all portions, &c. under the marriage settlement of the testator.

CODRINGTON Then after some directions as to legacies and an annuity, he
 LORD FOLEY. charged all the estates devised to him by Thomas Lord Foley,
 and not herein devised to be sold, with so much as his personal
 estate should be deficient to answer the legacies herein-before
 given, or to be given by any codicil; and he devised other
 estates in trust to be sold; and the money to be applied in pay-
 ment of his legacies and annuity, as aforesaid, and afterwards of
 the scheduled debts, as the money under the terms of ninety-nine
 years and 101 years. He then gave several legacies, and among
 them to his grand-daughter Caroline Georgiana Harriet,
 daughter of Thomas Foley, 5,000*l*.

[368] The testator by a codicil, taking notice of the death of
 Abraham Turner, appointed his son Andrew Foley a trustee in
 his stead.

The testator died some time afterwards; leaving Thomas Lord
 Foley his eldest son and heir, and tenant for life under the will;
 who died in 1793; leaving Thomas Lord Foley, his only son,
 and one daughter Caroline Georgiana Harriet, his only younger
 child; who in 1796 married Christopher Codrington, Esquire;
 and by the settlement, previous to that marriage, dated the 8th
 of August, 1796, reciting, that the last Lord Foley had died
 without having executed any appointment respecting the said
 sum of 30,000*l*. and that Miss Foley was become entitled to the
 whole of that sum; and that it had been agreed, that the said
 sum should immediately after the intended marriage become the
 absolute property of Mr. Codrington, and that the surviving
 trustee of the term of 1,000 years should covenant to assign the
 residue of the said term to him, as soon after the marriage as it
 could conveniently be done, by way of mortgage for securing the
 said sum of 30,000*l*. with interest from the 5th of July, 1795, to
 which time all interest on the said sum had been paid, it was
 witnessed, and the trustee covenanted accordingly.

By other indentures of the same date, reciting, that Mr. Cod-
 rington was desirous of making the said 30,000*l*. a provision for
 his daughters and younger sons by the said marriage, he
 covenanted, that he would, after the said mortgage to be made to
 him, assign the same, upon trust to permit him to receive the
 interest of the said 30,000*l*. for his life; and after his decease to

pay the said sum of 30,000*l.* amongst all his younger children by the said marriage, in such shares and proportions as he and Mrs. Codrington should appoint, as therein mentioned; with various provisions in default of appointment; and in case there should be no younger child, who should become entitled to the said sum of 30,000*l.* upon trust for Mr. Codrington, his executors, &c.; with a power to the trustees with the consent of Mr. and Mrs. Codrington to call in the 30,000*l.* and invest it in the funds in the names of the trustees.

By indentures, dated the 1st of September, 1796, the surviving trustee of the term of 1,000 years assigned to Mr. Codrington; to *hold for the residue of the term, subject to redemption; if Lord Foley or the person, who for the time being should be entitled to the premises comprised in the term immediately expectant on the determination thereof, should pay to Mr. Codrington the sum of 30,000*l.* with the interest due thereon from the 5th of July, 1795, on the 1st of March next; and by indentures, dated the 2nd of September, 1796, Mr. Codrington assigned and transferred the said sum of 30,000*l.* and the interest to become due from the marriage and all his interest in the term of 1,000 years; to hold for the residue of the term, subject to redemption, as aforesaid; to have and receive the said sum of 30,000*l.* and the interest thereof to become due from the marriage upon the trusts and for the intents and purposes expressed concerning the said sum and interest in the settlement, dated the 8th of August, 1796. The trusts of the term of 100 years were satisfied.

The bill in the first cause was filed by Mr. and Mrs. Codrington, and their children, four infant daughters, against Lord Foley, who was under the age of twenty-one, about eighteen, and the trustees of the term of 1000 years; praying an account of the principal and interest due on the security of the premises comprised in the term of 1,000 years; that what shall be found due may be paid by the defendant Lord Foley to the other defendants upon the trusts of the settlement; or that Lord Foley and all other persons entitled to redeem may be foreclosed; and that what shall be coming from the said account may be raised by sale of a sufficient part of the premises comprised in the term of

CODRINGTON 1,000 years; and that the trustees may be directed to pay the
 LORD FOLEY. plaintiff Christopher Codrington what shall appear to be due for
 arrears of interest of the said sum of 30,000*l*.

The trustees of the term by their answer admitted that the interest made payable upon the sum of 30,000*l*. is at the rate of 4 per cent. only; that no payment had been made on that account; and the plaintiffs had applied to them to raise that sum and the interest due, or at least to procure the interest to be raised to 5 per cent.

[*370] The defendant Andrew Foley, the surviving trustee in the terms of 98 years and 101 years, and also one of the trustees in the *marriage settlement of the plaintiffs, by his answer stated, that under the trusts of these terms the yearly sum of 6,000*l*. was paid in the proportion of 4,000*l*. to the testator's son Thomas Foley during his life, and 2,000*l*. to his son Edward Foley; which latter payment still continues; that their debts upon bonds and notes and by simple contract at the testator's death amounted to 87,800*l*.; great part of which has been since paid under the trusts of those terms; all, that remains unpaid, amounting only to about 12,112*l*.; which the defendant believes will be wholly satisfied by Midsummer 1802. He farther stated, that at the testator's death several other sums were due from his sons Thomas and Edward Foley for principal monies advanced to them in the purchase of annuities granted by them to the amount of 120,454*l*., exclusive of a large sum due for arrears; and the annuity creditors in 1792 agreed to release all claims for arrears of their respective annuities, and to accept their principal money originally advanced by them, on having the said principal secured by annual instalments of 8,000*l*., but without interest, out of the trust estates comprised in the terms of 99 years and 101 years. That object was carried into effect by indentures, dated the 1st of March, 1793; under which the sum of 56,000*l*. has been paid by instalments in part discharge of the principal sum; in respect of which 64,454*l*. remains a charge on the trust estates.

The answer suggested, that the defendant cannot concur in raising the principal sum of 30,000*l*. or increasing the interest on account of the infancy of the defendant Lord Foley, and the trusts of the term of 99 years not being fully performed. The

defendant farther insisted, that in case these impediments should not be considered sufficient ; yet as the plaintiff Mr. Codrington previously to the execution of the settlement expressly promised and agreed to wait for the principal and interest, until Lord Foley should attain the age of twenty-one, and the assignment of the term to the plaintiff being made under a persuasion, that he would not attempt to make the same available to enforce payments prejudicial to Lord Foley, until the trusts of the prior term of 99 years were satisfied, or, at least, until Lord Foley attained the age of twenty-one, the plaintiffs are not entitled to the relief prayed.

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The agreement of Mr. Codrington to wait, till Lord Foley should attain the age of twenty-one, was also set up by the answer of Edward Foley ; and according to the answers and the evidence of an agent the circumstances were these. The agent being in July, 1796, sent to London to take instructions for the settlement informed Mr. Codrington of the situation of Miss Foley's fortune ; explaining the trusts of the will ; and particularly, that she was entitled to 5,000*l.*, a legacy from her grandfather, and also to the said sum of 30,000*l.*, as the only younger child of her father, carrying interest from his death in 1793, charged on all the estates of Lord Foley comprised in the term of 99 years. The deponent then stated the trusts of the terms of 99 years and 101 years, the amount of the debts, with which the estates were charged, and the progress that had been made in reducing them ; and Mr. Codrington having heard the statement said, as that was the situation of Miss Foley's fortune, he would wait till Lord Foley came of age ; but wished to have the 5,000*l.* as soon as it could be got in. The answers and evidence represented the general understanding of all persons concerned in the settlement to have been, that Mr. Codrington must wait, till the trusts of the terms of 99 years and 101 years were satisfied, or till Lord Foley should be of age ; and stated, that the interest upon the sum of 30,000*l.* was made to commence from the 5th of July, 1795 ; as Mr. Andrew Foley had advanced money for Miss Foley's education ; and it was agreed, the sums advanced for that purpose, which amounted to two years' interest, should be deducted from the interest of the 30,000*l.*

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CODRINGTON The cross bill prayed, that the trusts of the terms of 99 years
 LORD FOLEY. and 101 years should be fully satisfied, before those of the term
 of 1,000 years should be executed.

An objection was taken on the part of the plaintiffs to the admission of evidence, as being in contradiction to the deed. That objection was overruled, and the evidence read: the LORD CHANCELLOR declaring it admissible to the point, that having it distinctly before him he understood his right; and gave it up.

Mr. Sutton and Mr. Romilly, for the plaintiffs:

[* 372] The objections against raising this portion are, first, that as it is to be raised out of *a reversionary term it cannot be made available, until the trusts of the preceding term are satisfied: 2ndly, that the plaintiff has waived his right.

Upon the first objection, there is no such absolute rule; though the Court leans against that construction, if they can discover any circumstances, affording an inference, that the portion was not to be raised, till the term came into possession. None of the reasons usually assigned, for the sake of the reversioner, &c. apply to this case. * *

[373] * * The question in all the cases has been with the person entitled to the estate, contending, that raising it by anticipation would be an injury to him. Those cases have no analogy to this; in which the defendant is entitled to an estate tail, not to commence, till this portion is paid. * * It appears by the answer that all the incumbrances, the subject of the prior trusts, have been paid, except 12,500*l.*; and that might have been paid long ago by the rents and profits; and then this sum of 30,000*l.*
 [* 374] would have been the first charge. The plaintiff only *desires the arrears of interest from 1795; to which time it was paid; and that the interest may be raised from four to five per cent.

Upon the second point, there is nothing amounting to a waiver of the right. * *

[The principal cases cited by the plaintiff's counsel are referred to in the judgment. The general result of all the cases cited is stated post, p. 342.]

Mr. Mansfield and Mr. Lewis, for the defendant:

Upon the first question, with respect to the inconvenience, there is no fund for the interest: and as to the principal, nothing could be more ruinous than raising this portion by this rever-
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 sionary term. * *

Upon the question of waiver the plaintiff agreed to wait, at least till Lord Foley should be of age: his solicitor and conveyancer having the will before them. * * [375]

LORD CHANCELLOR (after stating the case very particularly):

Under these circumstances the plaintiffs say, they are entitled to have this sum of 30,000*l.* raised, with 5 per cent. interest. If they can succeed in having it raised, by the effect of raising it they will of course receive 5 per cent.; for at present money cannot be got at 4 per cent., the ordinary interest of the Court. The claim is resisted upon two grounds: first, that under the effect of the will they are not entitled at present to have this sum raised, nor to have the interest either at 4 or 5 per cent. paid; founded upon this farther objection, that the trusts of the terms of 99 years and 101 years are not yet satisfied; and though the interest will run on, while those trusts are unsatisfied, yet that neither principal nor interest can be raised, till those trusts are satisfied. July 27.

The second objection is, that if according to the rules of the Court, independent of the circumstances of the plaintiff's conduct, he is entitled to have that sum raised and the interest paid, yet, attending to the circumstances of his conduct prior to and during the treaty of marriage, one part of the terms of the contract is, that this sum should not be raised; and with a view to the convenience of the estate under all the circumstances at the time of the marriage he entered into a contract, bargaining not to have that sum raised nor the interest paid, till the trusts of those terms are satisfied.

As to the latter ground, I am perfectly satisfied upon the answers and the evidence, that it is impossible to sustain that ground of defence. The whole of the case upon that amounts simply to this; that every party in that treaty took it for granted, that the effect of the will was, that this money could not be raised; and the plaintiff's conduct comes to no more than this; [376]

CODRINGTON that such a representation being made to him, and those, who LORD FOLEY. advised him, understanding it so, he expressed his willingness to marry, notwithstanding that part of Mrs. Codrington's fortune could not come into possession, till the trusts of those terms should be satisfied. There is no ground to impute a breach of contract to the plaintiff in filing this bill. It will be more accurately represented by putting it thus ; that if he was entitled to it, no one asked him to give it up ; if it was matter of doubt, it was not the intention of the parties to contract upon it as matter of doubt, and to decide in the contract the doubt as against Mr. Codrington : but they all took it for granted, there was no power in the trustees to raise this ; and therefore there could be no title in him to call for it. The proposal was made on the one hand under that persuasion ; and under that persuasion, as matter of persuasion and not of contract, the marriage was had.

The cause was argued, and very ably, with reference to a great number of cases, which have not a very direct application to the question furnished by this particular will. Most of those cases, I may say, all of them, were cases, in which the question was, whether the portion was to be raised without prejudice to some life estate antecedently limited and then existing. Previously to the case of *Corbett v. Maidwell*† there had been some cases, which have been treated in subsequent cases as very strong : particularly *Greaves v. Mattison* ; ‡ with regard to which I observe in *Corbett v. Maidwell*, Lord COOPER does not seem in any degree to disapprove of it. He lays down the rule thus :

[*377] “1st. That though a term is limited in remainder to commence after the death of the father, yet if the trust is to raise a portion payable at the age of eighteen or day of marriage, without *question the daughter shall not wait the death of her father ; but at the age of eighteen or marriage may compel a sale of the term.”

“2ndly. So it is, if the trust of a term for raising daughters' portions be limited to take effect, in case the father dies without issue male by his wife, and the wife die without issue male, leaving a daughter, in such case the term is saleable in the life of the father.”

Lord COWPER doubted, whether he could have gone so far, in

† 1 Salk. 159.

‡ T. Jones, 201.

case the matter were *res integra*. He then states the reasoning, CODRINGTON
 upon which that was founded; that by the death of the mother LORD FOLEY.
 the possibility of issue male was extinct: that all, that was contingent, had happened; and then states *Greaves v. Mattison*; in which case, I take it to be clear from the context, the remainder to the first son in tail male was to the first son by that marriage.

But in *Corbett v. Maidwell* the portions were to be raised for daughters, who should be unmarried or not provided for at the death of their father. Lord COWPER says, they could not be raised; for all the contingency had not happened; and it could not be determined till the death of the father, who was entitled. He makes no remark in disapprobation of *Greaves v. Mattison*; which is very strongly observed upon in subsequent cases by Lord MACCLESFIELD. In one case, I think, he ascribes to it the term “nonsense.” In another he speaks of the convenience and inconvenience. Lord COWPER’s observation as to that is, that it would be to no purpose for anyone to make deeds, if the argument of convenience or inconvenience should prevail to overrule them. Several decisions were made afterwards by Lord MACCLESFIELD; who seems to disapprove any inclination but a leaning to lay hold of any circumstances to disappoint the claim to have the portion raised in the life of the father. He appears to have been much influenced by arguments of policy as to convenience and inconvenience; and he states conversations, impertinent enough, which he supposes young ladies to hold with their fathers. Lord HARDWICKE follows him to the full extent; if he does not go beyond it; and both of them seem to depart from Lord COWPER’s concluding observation *by giving great effect to arguments of convenience and inconvenience. Lord HARDWICKE however in *Stanley v. Stanley* † lays down the rule thus:

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“If there be a term for years, or other estate, limited to trustees for raising portions for daughters, payable at a certain time, which is become a vested interest, they shall not stay till the death of the father and mother, unless some intention appears to postpone it; and if there does, the Court will always take notice of such intention, and postpone it accordingly; and the latter cases, as *Brome v. Berkeley*, 2 P. Wms. 484, and others,

† 1 Atk. 549.

CODRINGTON shew, the Court will lay hold of very small grounds, that speak
 LORD FOLEY. the intent of the parties to hinder the raising the portions in the
 life of the father and mother."

LORD HARDWICKE seems to have adopted very much Lord MACCLESFIELD's opinions, or rather those of Lord TREVOR; who, it seems from the conversation between him and Lord MACCLESFIELD, stated 3 Atk. 42, thought, Lord MACCLESFIELD went too far. Lord HARDWICKE felt all the inclination to narrow the rule, as Lord TREVOR expressed it: but with that inclination he lays down the rule in *Stanley v. Stanley* as I have stated it.

According to Forester, 32, Lord TALBOT thought this the true rule; that it depends upon the particular penning of the trust; and he agrees with Lord COWPER; that if all the contingencies had happened, the portion must be raised, notwithstanding the inconvenience, or there would be an end of deeds. Lord NORTHINGTON follows him; and expresses his approbation of all, that the Court had done in all times; for in *Smith v. Erans* † he expresses in a degree an approbation of the general rule, and of the decisions, which upon small circumstances, have formed departures from it. He advises that the Court should adhere to both; doubting, whether those latter decisions should have been made.

In *Conway v. Conway* ‡ Lord THURLOW is made to say this:

[*379] "Where a man gives portions, charged on a term to arise upon the death of a party, it shews, that they are not to be paid *till after the death of that party; and that though it be upon attaining twenty-one or marriage, yet that it can only be, where the term shall come into existence."

Upon looking at my own brief in that cause and to other cases I am satisfied, Lord THURLOW never did express himself in the words there attributed to him; which appear to contradict all the authorities. That doctrine is directly contrary to that of Lord COWPER, Lord HARDWICKE, and what all the cases, whether proceeding upon sufficient circumstances denoting intention, or not, do in effect say; that there must be some circumstances in the will or settlement, denoting the intention to take the case out of the general rule; which is, that the portions shall be raised at the days or times limited, unless the will or settlement

† Amb. 633.

‡ 3 Br. C. C. 267.

contain circumstances indicating an intention, that they are not to be raised at those days or times. CODRINGTON
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In *Lady Clinton's* case Lord ALVANLEY expresses himself thus : †

“ But notwithstanding the numerous cases upon this point, in most of which the party contending for the portion or maintenance has succeeded, it is now perfectly settled, and the more modern cases have clearly established, and it appears to have been the opinion of Lord MACCLESFIELD, who always found fault with what his predecessors had done, but always went as far as they did, that the Court will lay hold of any words, from which it can be fairly inferred, that it was not the intention to charge a reversionary term with raising portions in that manner, which must bring infinite inconvenience upon the reversioner ; and if upon the context of the settlement anything can be collected, by which it may appear, that it could not be the intention of the parties to raise them in that way, the Court is extremely eager to lay hold of that. That has been uniformly laid down by Lord COWPER, Lord MACCLESFIELD, and all their successors.”

Upon this general state of the doctrine of the Court it appears to me, that the proper rule is that Lord TALBOT states ; that the *raising or not raising must depend upon the particular penning of the trust and the intention of the instrument. I do not think, the Court ought to be eager to lay hold of circumstances. The Court ought to hold an equal mind, while construing the instrument ; and I cannot agree with what is said in *Stanley v. Stanley*, that very small grounds are sufficient. If they are sufficient to denote the intention, they are not small grounds : if they are not sufficient to denote the intention, the Court does not act according to its duty by treating them as sufficient ; thereby disappointing the true intention of the instrument. [*380]

The rule upon the whole depends upon this ; whether it was the intention of the parties to the instrument, attending to the whole of it, that the portion should or should not be raised in this manner ; taking it *primâ facie* to be the intention upon the general rule, if there is nothing more than a limitation to the

† *Lady Clinton v. Lord Robert Seymour*, 4 Ves. 440, at p. 460. That case turned upon a special clause which Lord Alvanley held to be clearly sufficient to preclude any sale or mortgage of a reversionary term. The decision was thus deprived of any general interest.—O. A. S.

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LORD FOLEY. parent for life, with a term to raise portions at the age of twenty-one or marriage, if there is nothing more, and the interests are vested, and the contingencies have happened, at which the portions are to be paid, the interest is payable, and the portions must be raised in the only manner, in which they can be raised : that is, by mortgage or sale of the reversionary term. It appears to me, that this case is distinguishable from all these cases in this circumstance ; that this is not attempted to be raised with any prejudice to the life estate of the parent. Therefore if the policy of a provident or improvident marriage would apply in other cases, it would not here : for it is clear as to the children of all the sons none of them can call for their portions in the lives of their fathers : the sum depending upon the appointment of the father by deed or will ; which therefore might not become effectual till his death ; and the proportions and restrictions, in and under which they are to take the same, and the times, must also depend upon the will of the father. Therefore, if the trusts of these terms were satisfied, still the portions could not be raised. There is no pretence of inconvenience as to the policy of marriage, or with regard to the enjoyment of the life estate, or the estate tail ; for that must also have commenced in possession, before any child could claim the portion.

[381] This will does not provide for a great many cases, that might, and some of which did, happen. The person, who drew the will, undertook a task so difficult, that it was hardly possible sufficiently to execute it. The testator meant to give to the trustees of the terms of 99 years and 101 years a power of providing for the creditors of his two sons ; excluding from all interest in the premises comprised in those terms the creditors and his eldest and second sons. Whether he meant, that creditors of every description should have the benefit of it, that annuity creditors by liquidating their demands into a principal sum should have the benefit of it, it is not useful now to consider ; for the words are sufficient to enable the trustees to provide for such creditors. But he forgot, that his first named devisee was his eldest son and heir at law ; and if the eldest and second sons and the creditors were to have no interest, it was not adverted to, that the law would create an interest somewhere. Notwithstanding

this therefore, the creditors found, they could either compel the trustees to provide for them, or there was a resulting trust for the eldest son; and if he did not take under the devise, he would take in that way; and so they might come at their debts, whether the trustees chose they should be paid, or not. That raised some suits very embarrassing in expense, that led to the arrangement made by the trustees. The testator also forgot another case, that might happen; that Lord Foley, Edward Foley, and Andrew Foley, might all of them die within two or three years after the testator; leaving a great number of younger children. Certainly it was not adverted to, if that case had happened, how they were to be provided with their portions; regard being had to the powers of the trustees of the terms of 99 years and 101 years to provide for all these creditors. Whether it was thought, that if Lord Foley and Edward Foley should die, the trustees would do well to make no provision for creditors, or, whether they calculated upon their living, until the creditors should be satisfied by the application of the rents, in which case there would be no embarrassment, because the children could claim no portion in the life of either of them, does not appear. Edward Foley is still living. Lord Foley is dead; and an arrangement has taken place with the annuity creditors; turning their demand into a capital sum, to a very large amount, about 80,000*l.* The demands of the other creditors were reduced to 13,000*l.*, and the annuity creditors were reduced to about 60,000*l.*; *and these sums were to be payable by instalments of 8,000*l.* a year. It does not appear in the cause, whether as against the tenant in tail Lord Foley the mode of paying the annuity creditors and the other creditors by these instalments does or does not exhaust the whole rents and profits; whether the tenant in tail notwithstanding this arrangement does or does not receive any income from his estate tail: but it is clear, the term for raising the portion over-rides the estate tail; and if the intention of the settlement is, that the tenant in tail should receive any thing, before the trusts of these terms are satisfied, *à fortiori* those, who take paramount, must. Therefore if Mr. Codrington could now be answered, that he should not receive the interest of the 80,000*l.* till those trusts are satisfied, and he

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should say to the trustees, that they had applied some of the rents and profits to the maintenance or to any other purpose for the tenant in tail, he might say, that if they were right in asserting, that he could not claim either the interest or the principal of the portion, until the trusts of these terms are satisfied, they were wrong in that application; and he might call that back, and apply what had been so paid to the trusts of those terms; to the intent, that those terms might be cleared of those trusts as expeditiously as possible for the benefit of him, entitled at all events to have the portion raised against the estate tail. It is clear therefore, if the bargain with the creditors has not exhausted the whole rents and profits, the trustees have a fund, that he has a right to have applied to his principal and interest, and which upon the principle of the trustees themselves he might have applied to the benefit of the creditors to discharge the trusts of the terms for his benefit. If the trustees say, the creditors have no right but what depends upon their will and pleasure, he might say, their will and pleasure has determined, that he must have it, by saying, the creditors shall not; for it is clear, the trustees cannot keep it; and it remains to be disposed of, as if there was no direction. It is clear therefore, they are wrong in their own principle: but they have dealt rightly as to the tenant in tail; the will giving these respective estates for life to the three sons; giving powers in their lives to provide for their younger children at their deaths a fund, that according to the express terms of the will in the case of Lord Foley would carry interest, and upon the rules of the Court would carry interest as to the children of the other tenants for life, having become vested, when they had *occasion for them, viz. upon attaining twenty-one or marriage, and which by the rules of the Court would sink, if they did not attain those periods; and providing in the case of Andrew Foley in the same manner as with respect to the others; and as to him, it is clear, there is no term overriding his life estate, and no power for jointuring, &c. interposing. It is clear, the testator meant the portions to vest immediately upon the death of Andrew, if the children had occasion for them. A strong inference arises from that, that he did not mean to postpone the portions of the children of the two eldest sons, till

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the trusts of those terms were satisfied: the management being committed to the trustees; who might by an arrangement, that would not defeat the purpose, provide for those creditors, if they thought proper. There is also a strong inference from this; that in a given event Andrew Foley was to come into the situation of Edward as to the estates devised to Edward, and as to his powers of jointuring, raising portions, &c. It is true, he is not by that divested of his original estates. He remains owner of them with the powers originally given to him. But the testator never meant, that if Andrew came into Edward's situation, he should not have those powers as to those estates, till after these trusts are satisfied, but with regard to his original estates he should have those powers.

Upon the whole, the intention was, that these portions should be payable at such ages, days, and times, as Lord Foley should appoint; and that power precludes all arguments of inconvenience and impolicy, and the possibility of its interfering with his life estate. But his giving that power to Lord Foley and directing interest till that time, at which Lord Foley should fix the principal to be paid, and the thing being a portion, is demonstrative of his intention, that, notwithstanding the trusts of those terms are not satisfied, the portion was vested at such time as Lord Foley should appoint after the decease of Lord Foley, carrying interest in the mean time.

There is much less inconvenience in this case than in holding the doctrine in *Corbett v. Maidwell*† and *Stanley v. Stanley*‡; for *there the rule was laid down, as applying to a life estate; out of the rents and profits of which the interest of the portion could not be satisfied, but must accumulate against the reversion. That is not the case here; for the testator has given 6,000*l.* a-year to Lord Foley and Edward Foley. The rest of the rents and profits of their life estates are left, as far as he could as to the disposal of them, to the absolute discretion of the trustees; and they might collect, that it was possible, that Lord Foley and Edward Foley might die, before any arrangement could be complete; and therefore as to the powers under these terms they had to manage an arrangement, which ought to provide for the younger children and the eldest equally of Lord Foley and

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† 1 Salk. 159

‡ 1 Atk. 549.

CODRINGTON ^{v.} Edward Foley and it was in their power to make an arrangement with the creditors, that would leave them the means of providing for these portions in events, that might have happened ; without which some of these children must have starved ; and others have been doomed to that pittance, which was never intended to be all they should take.

The case is within the rule, as laid down in the books ; and also the payment prayed by the bill is directed by the express letter of the trust ; and in a case, in which it is not owing to the effect of the will, but to something done by virtue of it, if there shall be heaped upon the reversioner accumulated interest, and there are no circumstances, (small circumstances and small grounds are words I do not like to hear in any Court) denoting, that it was the intention, not only, that the plaintiff should wait for her portion to the last hour of her life ; but also in a case, in which I am bound to say, if that was the intention, the testator must also have intended to starve the representatives of the two first branches of his family in a case, that might have happened.

Therefore according to all the cases and all the distinctions the plaintiff is entitled to interest, to the time, at which it is paid, that is, to 1795, and to have this portion raised.

Declare, that the plaintiff is entitled to have the portion raised, with interest at 4 per cent. before the filing of the bill and interest at 5 per cent. from the filing of the bill. I give no costs upon this bill. The bill to restrain the raising of the money must of course be dismissed with costs.

[385] I have found a note in a book I happen to have, 1 Eq. Cas. Abr., that belonged to Mr. Brown, who was a great practitioner in this Court, in the margin in his hand-writing, upon the report of *Butler v. Duncomb*†. I observe it the rather, because Mr. Cox in his note upon that case having used the industry of examining the Register's book, says, it appears, the sum of 3,000*l.* was divided by agreement. Mr. Brown says, he had heard Lord TALBOT say often, that upon the rehearing of *Butler v. Duncomb* the portion was directed to be raised ; but he had heard Lord HARDWICKE say as often, that though upon the rehearing it was directed to be raised, that was by an agreement for the purpose ; and it was so directed by consent.

† 1 P. Wms. 453.

CHAPMAN v. BROWN.†

(6 Vesey, 404—411.)

1801.

July 8, 30.

Rolls Court.

GRANT, M.R.

[404]

Trust by will for building or purchasing a chapel, where it may appear to the executors to be most wanted: if any overplus, to go towards the support of a faithful gospel minister, not exceeding 20*l.* a year; and if any farther surplus, for such charitable uses as the executors should think proper. The whole trust void, not only as to the real estate and a mortgage, but also as to all the personal estate; and the real estate went to the heir at law; and the personal to the next of kin.

ELIZABETH BROOKES by her will, dated the 21st of June, 1776, after giving, among several other legacies, if there should be any poor relations of her's at the time of her decease, as far as the second, that can be said to be in want, 5*l.* to each, and directing all her wearing apparel to be distributed among her poor relations at the discretion of her executors, gave all the rest and residue of her estate and effects whatsoever, freehold and otherwise, to her executors, after payment of the above legacies and her funeral expenses, for the purpose of building or purchasing a chapel for the service of Almighty God; and gave her two small silver waiters, her large silver cup, and her best damask table cloth and two damask napkins, for the use of the Communion table of the same; and requested, that her bureau-book-case with all her books may be deposited in the said chapel; and desired, that the chapel may be, where it may appear to her executors to be most wanted; and if any overplus should remain from the purchasing or building the same, she requested, that it might go towards the support of a faithful gospel minister, not to exceed the sum of 20*l.* a year; and if after that any farther overplus should remain, she desired, that the same may be laid out in such charitable uses as her executors shall think proper; and she appointed the Reverend Richard Hill and Thomas Chapman her executors. The latter was one of five legatees of 20*l.*; and to the former she gave 10*l.* for his trouble.

The testatrix died upon the 12th of June, 1800. Hill having renounced, Chapman proved the will; and filed the bill; praying an execution of the trusts of the will.

† *Re Birkett* (1878) 9 Ch. D. 576, 47 L. J. Ch. 846. See note 4 R. B. 252.

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The heir at law by his answer claimed the real estate ; and the next of kin claimed the personal estate.

Mr. Richards and *Mr. Hart*, for the heir at law, and next of kin :

[*405] This is such a devise and bequest, as the Court will not execute. It is clear as to the land. As to the personal estate, *it is given so, that an investment in land must necessarily have been in the contemplation of the testatrix. If the words are to be confined to building a chapel, supposing the ground to be already furnished, a case upon that point is now depending before the Lord Chancellor. In the argument of that case the *Attorney-General v. Tyndall*† was cited ; in which Lord NORTHINGTON against the general course of preceding cases held, that the application of personal estate to buildings already in mortmain still is amortising. A proposition directly contrary to that is broadly laid down in *Corbyn v. French* ; ‡ viz. that it may be applied for the purpose of ameliorating, beautifying, sustaining or repairing, buildings upon land already in mortmain. The LORD CHANCELLOR wished to have the point more considered, than it could have been as a short cause. But in this case it is clear, the testatrix intended land to be procured. Land already in mortmain cannot meet her idea of purchasing. She had no idea of land under such circumstances ; intending a distinct charity of her own.

The distinction of Lord HARDWICKE is stated in *The Attorney-General v. Nash* § and many other cases, collected in Highmore ; that erecting a chapel is considered as founding the thing ; building, otherwise. But it is always considered a question of construction. *Foy v. Foy* || had two bequests in it ; of which one was considered good : the other, not. Lord KENYON said, he would have declared both void ; if there had not been an hospital existing. Here is no chapel existing. Then as to the disposition of the surplus, the Court cannot take notice of that ; because the first disposition cannot take effect. *The Attorney-General v.*

† Amb. 614 ; 2 Eden, 207.

‡ 4 R. R. at p. 259 (4 Ves. at p. 427).

§ 3 Br. C. C. 588.

|| Cited 3 Br. C. C. 591.

Goulding.† This gospel minister must according to her intention be attached in some way to this chapel. The first purpose not being warranted, the second must fail with it. If the chapel cannot be purchased, you cannot fix upon any surplus to apply to any minister : the residue being the surplus upon an account, to ascertain the sum necessary for the purchase of the chapel ; which account cannot be taken. How can it be described to the Master, how much will be wanted for the building : a building of what value ? The whole fund cannot be applied to the minister ; for *that is not the intention. It is acknowledged in all the authorities, that if the first object fails, that, which is dependent upon it, must fail. * * The Master must then say, who is the minister to have the 20*l.* a year for ever. The additional bequest is not distinct, but connected with the general design of charity. By establishing the stipend alone the Court will go against the intention ; which was, that a minister of her own should have it : that not being the main object : but only for the purpose of providing a minister to do the duty of the chapel. There is a mixture of vanity in this, as in all these cases.

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Then, as to the point, whether the Crown will be entitled to apply the residue to any charitable purpose, this will does not afford a sufficient ground for that. * *

Mr. Nolan, for the *Attorney-General* in support of the Charity :

This disposition is not void, except as to the real estate and the mortgage. All these objects are legal. It must be admitted, that it would be void, if the trust was merely to purchase a chapel : but being for the purpose of either building or purchasing, in the alternative, if the purpose of building can be supported, the Court will give effect to that mode, which may be established. If therefore this can be sustained as a bequest for the purpose of building upon land already in mortmain, or if land should be given, it may be established. The discretion given to the trustees as to the situation of the chapel, where it may appear to them to be most wanted, is strong in support of

† 2 Br. C. C. 428.

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[407] But if that is void, the other disposition is valid. * * A bequest may be void in one part, and good in the limitation over: *The Attorney-General v. Hartley*.† All the cases upon the doctrine of *cy pres* go upon this principle; that, where it is evident, some distinct object of charity should take place, before the legacy should lapse, the Court will fulfil that intention. In this will the intention is clear, that the representatives shall take nothing, but the whole shall go to charity, from the legacies to the relations.

THE MASTER OF THE ROLLS (after stating the case) :

July 30. The only question is with regard to the validity of the bequest for charitable purposes. It is contended for the heir at law, that as to the real estate the devise is void; and that unquestionably is so. It is also clearly void as to the mortgage. By the next of kin it is contended, that the disposition is void, so far as it directs the residue to be laid out in building or purchasing a chapel; and it is contended by the *Attorney-General* on behalf of the charity, that being in the alternative, to build or purchase, if either of those purposes could legally be effected, the trust ought to be carried into execution; and that undoubtedly would be so. It is insisted, that the purpose to build a chapel upon ground already in mortmain is legal; though to purchase ground for the purpose of building a chapel is not legal. *The Attorney-General v. Bowles* ‡ was referred to, as an authority, that, if there is a bequest of money to be laid out in building a chapel or school, the intention is to be taken to be, to build, in case a piece of ground already *in mortmain could be found for that purpose; and that case undoubtedly is an authority for that.

But this case appears to have been overruled by a great number of subsequent decisions. Upon the principle established

† 4 Br. C. C. 412.

‡ 2 Ves. Sen. 547.

by the case itself it seems a little extraordinary, that a testator having made no reference whatsoever to the case of land being already in mortmain, the Court should suppose an intention, that he has not in the most remote degree pointed to. But Lord HARDWICKE in favour of a charity held, that such an intention might be presumed.

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The first case, in which that authority was impeached is *The Attorney-General v. Tyndall*,† before Lord HENLEY. In a subsequent case, *The Attorney-General v. Hutchinson*,‡ Lord BATHURST takes Lord HENLEY to have there decidedly overruled the other case. In argument he certainly did overrule it; for he disapproved of the ground, upon which that was decided: but the case immediately before him did not call for that decision; for it was not a case of the same kind. In that case the direction was expressly to purchase: and there was no option. But all the reasoning of Lord HENLEY went in direct contradiction to the former case. He held, that the statute had two objects: first, that you shall not give land for the benefit of a charity: 2ndly, that you shall not realise for the benefit of a charity; that the mischief is the same; for, if that precedent was to prevail, a piece of ground, that was only worth 50*l.* might be made worth 20,000*l.*; which undoubtedly is putting it in mortmain.

But a case directly in point occurred before Lord Northington in 1764, *Pelham v. Anderson*;§ for there 2,000*l.* was given to build or erect an hospital. That was determined by him to be void. That case did directly overrule *The Attorney-General v. Bowles*, the purpose being precisely the same. Then came the case of *The Attorney-General v. Hutchinson*; to which I have before alluded, in 1775; where the bequest was, according to the report in Ambler, for the purpose of erecting, and, according to a *note in Brown, for erecting and building a free school. A strong circumstance there was, that there was in the parish a piece of ground in mortmain; upon which a school had formerly been erected; and it was contended, that the fact was in the testator's contemplation; and the intention was to re-erect the school upon that foundation: but Lord

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† Amb. 614.

a note.

‡ Amb. 751; 1 Br. C. C. 444, in § 1 Br. C. C. 444, in a note.

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BATHURST thought, that, as the testator had not himself pointed to that intention, it was not to be presumed by the Court. Therefore it was not to be taken as a mere bequest for the purpose of erecting or building a school; and it had been determined in *Pelham v. Anderson* and the other cases, that such a bequest was void.

Then the case of *Foy v. Foy*[†] occurred; which went much farther than either of these cases. There the legacy was given towards the erection and endowment of an hospital. Lord HARDWICKE in *Vaughan v. Farrer*,[‡] and *Gastril v. Baker*[§] held, that to erect does not necessarily imply to build, much less a purchase of ground for building. He held, it might mean merely an endowment: but Lord KENYON in *Foy v. Foy* held, that, if there was no hospital already existing, that would be void.

Then came the *Attorney-General v. Nash*;|| in which the words “erect and build” occurred. The former undoubtedly is not so strong as the other, from what Lord HARDWICKE had held, that it might mean an endowment. Therefore in that case the word “build” was the operative word. But Lord THURLOW held the bequest altogether void, and allowed the demurrer.

In this case the alternative is to build or purchase. It is admitted, a bequest to purchase would be void; and it is determined by all those cases, that a bequest for the purpose of building a chapel is equally void. That bequest therefore falls to the ground.

[*410] The next question arises upon the direction, that if any overplus remains after the purchasing or building the chapel, it shall go towards the support of a faithful gospel minister, not exceeding *20*l.* a year. It is contended by the next of kin, that this is a bequest dependent upon the former; and, that failing, this must likewise fail, upon the authority of the *Attorney-General v. Goulding*.¶ The late MASTER OF THE ROLLS

† At the Rolls, 1st February, 1785. cause was *Cantwell*.
Cited 3 Br. C. C. 591. || 3 Br. C. C. 588.

‡ 2 Ves. Sen. 182.

¶ 2 Br. C. C. 428.

§ The name of the plaintiff in that

seemed† to doubt a little the doctrine of that case in the *Attorney-General v. The Earl of Winchelsea*:‡ but afterwards in the *Attorney-General v. Boulton*§ he approved of that doctrine; and acted upon it. It is then contended, that this is not dependent upon the other purpose; but is for the support of a minister generally, not at that chapel. I am clearly of opinion, she must have meant a minister in that chapel, which she meant to be purchased. It would be quite absurd to suppose, she intended no provision for the minister of her own chapel; but that a provision should be made for the minister at some other chapel, to be built by a stranger. Therefore upon the authority of the *Attorney-General v. Goulding* and the *Attorney-General v. Boulton* that bequest must fail; as the chapel is not to have existence.

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Upon these two parts of the case I have had very little difficulty: but I have been a good deal embarrassed as to the ultimate bequest of the residue, to be applied by the executors in general charitable purposes. Standing by itself, a bequest of a residue to be employed in such charitable purposes as the executors shall think proper is a good bequest; supposing it legal to do as the testatrix had directed, and a residue had been left, after those purposes were answered, there would have been a good bequest of it; and therefore the question is, whether that ulterior bequest is to fail, because the prior bequest cannot take effect. If it could be reduced to any certainty, how much would have been employed by the executors for the other purposes, the residue ought to be employed under this last direction, viz. for charitable purposes generally. I have considered, whether that can be ascertained by a reference to the Master, to see, how much would have been sufficient for this chapel: but upon consideration it is quite impossible to give any direction, that would not be vague and indefinite, to a degree almost ridiculous: an inquiry, what they might have employed for building a chapel, without knowing what kind of chapel: the *testatrix having given no grounds to ascertain, what kind of chapel: no locality. It is utterly impossible to frame any direction, that would enable the Master to form

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† 3 Br. C. C. 379. ‡ 3 Br. C. C. 373. § 2 R. R. 265 (2 Ves. J. 380).

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any idea upon it. If she had even pointed out any particular place, that might have furnished some ground of inquiry as to what size would be sufficient for the congregation to be expected there: but this is so entirely indefinite, that it is quite uncertain, what the residue would have been; and therefore it is void for that uncertainty. She had no view to any residue but a residue to be constituted by actually building a chapel. She contemplated no residue but with reference to that. It is impossible to ascertain it in the only manner, in which she meant it to be ascertained. It is impossible for the Court to apply it. Therefore the whole of this disposition is void.

Declare the devise and bequest for these charitable purposes void; and that the real estate belongs to the heir at law; the personal to the next of kin.

BLOXHAM, Ex PARTE.†

(6 Vesey, 449—450.)

1801.

Aug. 11.

ELDON, L.C.

[449]

Creditor having securities of third persons to a greater amount than the debt may prove and receive dividends upon the full amount of the securities to the extent of 20s. in the pound upon the actual debt.

KIRKPATRICK, of Liverpool, having an account with the petitioners as his bankers, from time to time remitted bills to answer his drafts, and among others six bills drawn by him and accepted by the bankrupts Young and Glennie. Kirkpatrick also becoming bankrupt, the petitioners proved under his commission the sum of 3,294*l.* 12*s.* 11*d.* due to them upon a balance of accounts. They also proved under the commission against Young and Glennie the sum of 3,869*l.* 10*s.* 3*d.* the amount of the six bills accepted by them. A dividend of 2*s.* in the pound was declared under the commission against Young and Glennie; which dividend was paid to the petitioners upon the sum of 3,294*l.* 12*s.* 11*d.* only, without prejudice: the assignees refusing to pay the dividend upon the residue of the amount of those acceptances; suggesting, that the petitioners were entitled to receive a dividend only upon the actual balance

† *Ex parte Newton* (1880) 16 Ch. D. 330, 50 L. J. Ch. 484.

due to them from Kirkpatrick. No dividend had been declared under the commission against Kirkpatrick.

BLOXHAM,
Ex parte.

The prayer of the petition was, that the assignees under the commission against Young and Glennie may pay to the petitioners the dividend of 2*s.* in the pound upon the residue of the sum of 3,869*l.* 10*s.* 3*d.* proved by them; and that they may receive upon the whole of the said sum future dividends, not exceeding 20*s.* in the pound upon the debt to them from Kirkpatrick: the petitioners insisting, the bills accepted by Young and Glennie are to be considered collateral securities, to be retained, until the *whole of the debt due to them from Kirkpatrick shall be fully satisfied.

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Mr. Mansfield and *Mr. Cooke*, in support of the petition.

Mr. Richards for the assignees insisted, that they were right in confining the dividend to the actual debt; and said, Kirkpatrick was indebted to these bankrupts.

LORD CHANCELLOR:

I looked upon it as settled, that you cannot hold the paper of the bankrupt, and prove beyond your actual debt upon it; but that you may have the paper of third persons, those persons being indebted to your debtor in more, and you may prove to the whole amount, not exceeding 20*s.* in the pound upon the original debt. Suppose, you owe 1,000*l.* and as a security assign a bond for 2,000*l.*; cannot the creditor prove the 2,000*l.* till he gets the 1,000*l.*? The petitioners are creditors of Young and Glennie for the whole amount of their acceptances: they are creditors of Kirkpatrick for less: in this situation they have a right to apply their legal demand against Young and Glennie to the extent of obtaining the full amount of their actual debt. The case is no more than this: Kirkpatrick had an account with the petitioners; and sent them bills accepted by this bankrupt from time to time to cover that account. If the petitioners can only prove the amount of their debt, they have not the full benefit of the security. It is not material, that Kirkpatrick was indebted to Young and Glennie; for you

BLOXHAM, cannot attach equities upon bills of exchange. The petitioners
Ex parte. therefore must prove the amount of that paper, given to them
 to secure that debt.

The order was made.

1801.
 Nov. 12, 16.

Rolls Court.
GRANT, M.R.

On Appeal.
 1803.
 Dec. 16.

ELDON, L.C.

[464]

INNES v. MITCHELL.

(6 Vesey, 464—466; 9 Vesey, 212—214.)

Bequest of an annuity of 200*l.* for the use of A. and her children, to be paid out of the general effects until it is convenient to the executors to invest 5,000*l.* in the funds in lieu thereof for her and their use, and to the longest liver, subject to an equal division of the interest, while more than one alive: held an annuity, not an absolute legacy.

The decree affirmed on appeal.

WILLIAM INNES, having by his will given several annuities, and directed the mode of payment by investing a convenient sum, by a codicil, dated the 20th of June, 1790, made the following bequest:

“I give to Mrs. Janet Innes relict of my late nephew Alexander Innes two hundred pounds per annum for the use of herself and children which annuity is to be paid out of my general effects until it is convenient to my executrix and executors to invest five thousand pounds in the funds in lieu thereof for her and their use and to the longest liver of her and her children subject to an equal division of the interest while more than one of them alive.”

The testator died in January, 1795. The bill was filed in January, 1799, by Janet Innes and her three children against the executors; praying, that the defendants may be decreed to invest the said sum of 5,000*l.* in satisfaction of the bequest, and to pay the plaintiff interest thereon since the time they have had assets in their hands sufficient to satisfy the same; the plaintiff Janet Innes submitting to allow what she had received in respect of the annuity of 200*l.*; that an inquiry may be directed, to ascertain, when they received such assets; and an account of the personal estate; and in case the Court shall be of opinion, that the plaintiffs are not absolutely entitled to the said 5,000*l.*, that they may be declared entitled to the interest thereof during their lives and the life of the survivor of them, &c.

The defendant, the acting executor, by his answer stated, that

he is unable to set forth, whether the personal estate will be sufficient to pay the legacy claimed by the bill; unless it is to be preferred to common pecuniary legacies.

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Mr. Alexander and Mr. Cullen, for the plaintiffs :

The first consideration is, whether this is an absolute legacy of 5,000*l.* The expression, “until it is convenient” in this codicil can receive no other construction than this: as soon as the executors have received clear assets applicable to the discharge of the legacy. The second point is, whether this continues to be a mere annuity, or, whether the legatees are not entitled to the interest of the 5,000*l.* during their joint lives; and the survivor to take the capital of the whole. The latter part of the clause “subject to an equal division of the interest, while more than one of them alive,” upon which it will be contended, that they are not to have any interest in the principal, will not detract from the prior absolute gift.

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Mr. Romilly and Mr. Leach, for the defendant :

The question is, whether the principal or the interest only of 5,000*l.* is given. The use is clearly applied only to the interest; to an annuity, as long as it is in the shape of annuity, without a capital, and the interest of the capital, when that capital is invested. The same direction is given as to the annuity to his wife and the other annuities; that a particular part of his property shall be set apart for the payment of that particular annuity. If these plaintiffs were entitled to the 5,000*l.* immediately of what use is the direction, that it shall go to the longest liver of them? The annuity of 200*l.* is the substantive gift: the will then directs, out of what fund that is to come: the subsequent words are mere limitations of the gift. That construction is sensible and consistent: the other supposes a second substantive gift. Then suppose the mother had died the day after the testator, the consequence would have been, that the children would have had nothing till the 5,000*l.* was invested.

Mr. Alexander, in reply :

The other parts of the will as to the other annuities do not

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apply: the continuance of those annuities being distinctly expressed, and the words of this bequest having a contrary import, the inference is directly the reverse. How can this be a continuance of the same annuity? The case put of the death of the mother, before the 5,000*l.* should be produced, and the consequence, that the children would be unprovided for, are not material. These dispositions are in a very inaccurate instrument: but I do not conceive, that consequence would follow. The children would notwithstanding her death be entitled to the annuity, until the other provision should be made.

THE MASTER OF THE ROLLS:

Nov. 16.

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It is very difficult to form any decisive opinion upon a codicil so very obscurely penned: but I am inclined to think it was not the intention of the testator to give a principal sum, but only to secure an annuity. It is a mode taken by the testator in many parts of his will; giving annuities, and directing the mode in which they shall be paid. The difference here is, that 5,000*l.* is directed to be invested in lieu thereof; but still for the same purpose, I apprehend; and the only difference between this and the other bequests is, that in the others the expression is a convenient sum: in this a specific sum is mentioned: but it is evident upon the whole, the testator did not mean to convert the annuity at a given period into a legacy of a specific sum; but intended, that it should continue as annuity during the lives of the legatees; and the survivor of them should receive the whole interest; and, till there is a survivor, all the legatees shall receive the whole annuity among them.

The plaintiffs appealed from this decision.

On Appeal.

1803.

Dec. 16.

Mr. Alexander and Mr. Cullen, for the appeal.

[9 Ves. 212.]

Mr. Romilly, in support of the decree, was stopped by the Court.

THE LORD CHANCELLOR:

I think, the MASTER OF THE ROLLS has gone to a right conclusion upon this. The case is doubtful: but, taking the whole

together, the construction made by this decree is right. In considering the few words, upon which the question arises, I think, the testator by the direction, that the annuity was to be paid out of his general effects, until it is convenient to invest 5,000*l.* in the funds, meant, not only that it should be payable out of the interest of the general personal estate; but, that the capital was to be liable to make good the annuity, while it was to be an annuity; and till another fund should be substituted in lieu of the general effects. Though certainly the question is to be decided by having regard principally to this clause, yet the whole scheme of the will must also be looked through; and it is clear, he knew perfectly well how to express the idea this appeal contends for; having previously given the yearly sum of 1,000*l.*, to be paid half-yearly to the annuitant during her life; for which he directs a sufficient sum to be invested in the public funds, or such as she shall approve of. Here it is clear, he meant an annuity of 1,000*l.*; and to impose *upon his executors the duty of collecting a sufficient fund for that in preference to all other objects of his bounty.

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Having made this disposition by his will, the idea naturally occurred to him, in what manner his other annual bounty was to be paid, while that was collecting; and in making the subsequent disposition he must be taken to have had in his mind, that he was to provide for it, regard being had to the mode, in which he had made the former disposition. This seems to have been his idea with reference to Mrs. Innes and her children; intending, they should have 200*l.* a-year; but that they should have it, regard being had to the manner, in which the former disposition was made; and particularly to the direction for collecting a fund from his effects; intending that annuity of 200*l.* to be paid from time to time out of his general effects, until, regard being had to the fund to be collected and to the priorities, the sum of 5,000*l.* can be got together; and when that sum shall be got together, that they shall have the interest of it.

The first principle of construction is, that the general scheme of the will may be looked at, in order to get over difficult passages in the particular bequest. Next, the operation of the particular bequest would be singular by a construction less conformable to

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what the general scheme of the will would require. It would be a strange construction, and could not be intended, that, if the mother and all the children should die, before the 5,000*l.* should be collected, the annuity ceasing by the death of the survivor, yet the 5,000*l.* is to be paid to them as a legacy ; jointly, if no act was done by them to sever it ; as tenants in common, if any act was done. It would be singular also to say, he meant them to be tenants in common of the interest and *joint-tenants of the principal ; and there is a clear direction for them to be tenants in common of the interest, independent of any act of their own : yet it is to depend upon their act, whether they are not to be joint-tenants of the principal.

Upon the whole, admitting this to be a doubtful question, participating in the doubt expressed by the MASTER OF THE ROLLS, I think the construction of this decree the best, that can be put upon this will.

The decree was affirmed.

1801.
Nov. 27.

ELDON, L.C.

[499]

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(6 Vesey, 499—511.)

Portion vested in the case of parent and child by implication from the whole settlement, against express words ; and a clause of survivorship upon the death of a child, before the portion should become payable, was upon the authorities construed, before it should be vested.

Posthumous child to be considered as living.

By indentures of lease and release, dated the 3rd and 4th of March, 1739, previous to the marriage of Eliab Breton and Elizabeth Wolstoneholme, in consideration of the marriage and of a settlement of the same date by Elizabeth Wolstoneholme of her estate of inheritance for the benefit of Eliab Breton and the issue of the marriage, and for other considerations, certain real estates in the county of Northampton were conveyed to trustees and their heirs ; to the intent, that Mary Breton, the mother of Eliab Breton, should receive a rent-charge of 400*l.*, secured by a term of 99 years upon part of the said premises ; and, subject thereto, to the use of Eliab Breton for life ; remainder to trustees to preserve contingent remainders ; remainder to trustees for 150

† *Jeyes v. Savage* (1875) L. R. 10 Ch. 555, 558 n., 44 L. J. Ch. 706.

years for securing a jointure of 300*l.* a year to Elizabeth Wolstoneholme in bar of dower; and subject thereto to the use of trustees, their executors, &c. for a term of 500 years; remainder to the first and other sons of the marriage in tail male; remainder to Eliab Breton, his heirs and assigns for ever.

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The trusts of the term of 500 years were declared to be, in case there shall be any child or children of the said Eliab Breton on the body of the said Elizabeth Wolstoneholme his intended wife to be begotten living at the time of the decease of the said Eliab Breton or afterwards born alive other than such as shall be heir male of his body for the time being, then the said trustees, their executors, &c. shall and do after the decease of the said Eliab Breton, but subject nevertheless and without prejudice to the said several annuities or yearly rent-charge of 400*l.* and *300*l.* by sale or mortgage of the said premises comprised in the said term of 500 years or of a competent part thereof for all or any part of the said term, or by or out of the rents, issues, and profits, thereof in the mean time until such sale or mortgage can be made, or by all or any the ways and means aforesaid, raise and levy the sum of 5,000*l.* of lawful money of Great Britain for the portion and portions of all and every the child and children of the said intended marriage other than and except an eldest or only son; to be applied and disposed of in manner following: in case there shall be but one such child, then such child shall have the whole sum of 5,000*l.* for his or her portion; and in case there shall be two or more such children, then the said sum of 5,000*l.* to be equally divided between or amongst them share and share alike: the portion or portions of such of them as shall be a son or sons to be paid to him or them at his or their respective age or ages of twenty-one years; and the portion and portions of such of them as shall be a daughter or daughters to be paid to her or them at her or their respective age or ages of twenty-one years or day or days of her or their respective marriages which shall first and next happen after the decease of the said Eliab Breton; and if any of the said younger sons shall attain the age of twenty-one years, or any of the said daughters shall attain the age of twenty-one years or be married in the life-time of the said Eliab Breton,

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then the portion and portions of such of them as shall be a daughter or daughters, younger son or younger sons, shall be paid to him, her, or them, within three months next after the decease of the said Eliab Breton, unless the said Eliab Breton shall by any writing or writings under his hand and seal direct the same to be raised in his life, which it is hereby agreed and declared it shall and may be lawful for him to direct or appoint accordingly ; so as the same be no prejudice to the said several rent-charge of 400*l.* and 300*l.* so limited to the said Mary Breton and Elizabeth Wolstoneholme, as aforesaid, or either of them. And also upon this further trust ; that in the mean time from and after the decease of the said Eliab Breton, until the same portion or portions shall become payable, they the said trustees, their executors, &c. shall and do by and out of the rents, issues and profits, of the premises so limited to them for the said term of 500 years, as aforesaid, but subject nevertheless and without prejudice to the said several rent-charge of 400*l.* and 300*l.* *raise, levy, and pay, such yearly sum and sums of money for the maintenance and education of the child and children of the said intended marriage entitled to portions under the trusts of the said term, until their said portion or portions shall become payable, as are herein after mentioned (that is to say) : in case there be but one such child, the yearly sum of fifty pounds, till he or she shall attain the age of twelve years ; and from and after that age, and until his or her portion shall become payable, the yearly sum of one hundred pounds ; and if there shall be two such children, the yearly sum of forty pounds for each of them, till they shall respectively attain their respective ages of twelve years ; and from and after their respective ages of twelve years the yearly sum of 80*l.* a piece ; and if there shall be three or more of such children, such yearly sum for each of them, until their respective portions shall become payable, as will amount unto and be equal with the interest of their respective portions after the rate of four pounds per centum per annum : the said yearly sum or sums for maintenance to be paid at or on the feasts of St. Michael the archangel, and the annunciation of the blessed Virgin Mary in every year by even and equal portions : the first payment thereof to begin and be made at or on such of

the said feasts as shall first and next happen after the decease of the said Eliab Breton: Provided nevertheless, and it is hereby agreed and declared, that if any of the said children of the said intended marriage entitled to the portions under the trusts of the said term of five hundred years shall happen to die, or become an eldest or only son, before his, her, or their portion or portions shall become payable, then the portion and portions of him, her, or them, so dying or becoming an eldest or only son, shall go, accrue and be paid, unto the survivors and survivor and others and other of them, when his, her or their, original portion or portions shall become payable by virtue of these presents: Provided also, that in case all the children of the said marriage entitled to portions under the trust of the said term of five hundred years shall die, before any of their said portions shall become payable, then the said sum and sums of money so to be raised for such child and children, or so much thereof as shall not then be raised, shall not be raised, but shall cease for the benefit of the person and persons entitled to the reversion or remainder of the premises immediately expectant on the determination of the said term of five hundred years; and then also such sum and sums *of money as shall be then raised for or towards such portion or portions, as aforesaid, shall be paid unto the same person and persons so next in reversion or remainder as aforesaid.

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The indentures also contained a proviso, that, if Eliab Breton should in his lifetime settle, give or advance, unto, for, or upon, any of the children entitled to portions any sum or sums of money, lands, tenements, goods, or chattels, for and towards their advancement, preferment in marriage or otherwise, then such sums of money, or the value of such lands, tenements, goods, and chattels, to be received by, given to, or settled upon, such children, should be accounted as part, if less, or, if as much or more, for the whole, of the portions provided for them, as aforesaid; unless the said Eliab Breton should by writing under his hand and seal signify the contrary.

The issue of this marriage was four children: three sons; Michael Harvey, William, and Eliab, and one daughter, Mary. The daughter attained the age of twenty-one in the life of her father; and married John Hope, by whom she had three sons.

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Mary Hope died in the life of her father, who died in December, 1785; leaving his wife and three sons surviving. Michael Harvey Breton, who had been in possession of the estates since the death of his father, died in 1798, leaving a son; and Mary Breton and Elizabeth Breton, the mother and widow of Eliab Breton, had been dead several years.

The bill was filed by the eldest son and administrator of Mary Hope; stating, that she had not been advanced by her father; and that her brothers William and Eliab had been advanced by their father to a greater amount than their shares of the sum of 5,000*l.*; and had executed releases to their brother Michael Harvey; and praying an account of what is due in respect of one-third of the said sum of 5,000*l.*; and that what shall appear due may be raised under the term.

The defendant William Breton, the son and heir of Michael Harvey Breton, by his answer submitted, that the sum of 5,000*l.* did not become a vested interest in any of the children of Eliab and Elizabeth Breton during the life of their father; and Mary
[*503] *Hope having died in his life, the plaintiff is not entitled to have any part of the said sum raised.

Mr. Mansfield, Mr. Romilly, and Mr. Bell, for the plaintiff:

The single question is, whether Mrs. Hope, who attained the age of twenty-one, and married, lost her portion by dying in the life of her father. The established doctrine of this Court is, that, if portions are directed to be paid at the age of twenty-one or the marriage of daughters, with survivorship, followed by a provision, that if they attain those periods in the life of the father, the portions shall not be paid till after his death, yet that clause shall not prevent the vesting in his life. *Emperor v. Rolfe*; † *Cholmondeley v. Merrick*.‡ [They also cited *Woodcock v. Duke of Dorset*.§]

The *Solicitor-General, Mr. Sutton, and Mr. Harvey*, for the defendants:

There was no vested interest under this settlement in any child, who did not survive the father. The intention must be found through the medium of the words. Though such a provi-

† 1 Ves. Sen. 208.

‡ 3 Br. C. C. 253, note.

§ 3 Br. C. C. 569.

sion may be very unusual and unreasonable, it is not illegal, or such as this Court will refuse to execute. * * This event of a younger child attaining twenty-one and dying in the life of the father probably did not occur to the drawers of the settlement; and therefore was not provided for; as, upon wills particularly, there are many events of which the parties had no foresight. The introductory words are the first thing; upon which the whole proceeds; and must prevail, unless afterwards explained. [They cited *Wingrave v. Palgrave*.†]

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Mr. Mansfield, in reply.

LORD CHANCELLOR :

Though I agree with Lord THURLOW's expression in *Woodcock v. The Duke of Dorset*,‡ that the words are strong, and difficult to manage, and notwithstanding the strength of opinion expressed by the counsel against this claim, I feel a strong inclination at this moment in favour of it. It is quite clear upon all the cases, that, to get rid of the difficulty, the Court looking upon it as a hard thing to impute to a father, that he should mean, a child having attained twenty-one, or come to marriageable years, and formed a family, yet, because that child dies in his life, the descendants should have nothing, and feeling that not to be a probable intention in a parent, have thought themselves at liberty to manage the construction of the words, as they would not in the case of a stranger, or upon a matter of contract, without any mixture of parental feeling. In *Wingrave v. Palgrave*, it is obvious, if a son had lived to the age of twenty-one, he might have destroyed the trust term. Of necessity therefore a circumstance existed, that is relied upon for the defendants in this case, that the claim of the daughter must have been contingent during the whole life of the father; as he might have a son. Two contingencies are expressed in that case: dying without an heir male, and leaving a daughter or daughters; and that from the context, which gives a clear exposition, that it was not meant having had a daughter, must mean at his death. In *Woodcock v. The Duke of Dorset* also the expression is "leave." In the

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† 1 P. Wms. 401.

‡ 3 Br. C. C. 569.

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former case it was held a condition precedent; because the word "leaving" meant upon the context at his death; and secondly, because the term at law was gone; and it must have been considered by the Court, as if never in the settlement. It was impossible therefore, that there could be any doubt upon that case.

The case of *Emperor v. Rolfe*, the date of which I mark, in 1748, was very like a new decision. It seems therefore to have been a long time, before the Court could get over the natural effect of words so strong and so difficult to manage. The construction in that case was, that the words "grow due and payable" were, for the benefit of the estate, and attending to the motives of parental feeling, with reference to the age of twenty-one or marriage in the life of the parent, to secure the portion. There was a contingency there; at least a contingency to divest what was vested under the former words. That is certainly different *from this case; in which it is contended, that the contingency is one, that prevents the vesting, not merely to divest. *Cholmondeley v. Meyrick*, which in the subsequent case of *Willis v. Willis*† the LORD CHANCELLOR cites from an accurate note of the settlement, was decided in 1758. A very material circumstance in that case is, that the father might have appointed by will. It might have been argued, that those, who were to take for want of appointment, were the objects of appointment. The difficulty was, that as he had the power of appointing by will, the children to take could not be determined, till he was dead. It might therefore have been contended, that it did mean children, unless they survived; so as to be the objects of such an appointment. But the case in default of appointment having actually happened, and a child having attained the age of twenty-one in the life of the parent, though the words were "due or payable," which have the same meaning as "due and payable" in *Emperor v. Rolfe*, the Court would not be entangled with the other question; but said, they were glad, the case had not arisen, in which that argument could be pressed; and as there was no appointment, *Emperor v. Rolfe* might be followed, though the child died in the life of the parent; and died, not before one contingency, before the portion became due, though before the other, its becoming payable.

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† 3 Ves. 50; see note, *post*, p. 374.

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A great many cases have followed in this Court; proceeding upon the authority of these two. The next, that was cited, is *Woodcock v. The Duke of Dorset*; which is stronger than any other; for, if the word "leaving" is construed in the context with "survivor," it is impossible to deny, that there was a contingency existing during the lives of the parents; as it is contended that there is here. The recital is a circumstance in the deed, upon which you can argue to the intention: but it is not that sort of circumstance, that the Court would, except between parent and child, lay hold of to destroy by the recital the obvious and clear effect of the words in the other parts of the deed. The words in this case are much stronger than those in *Wingrave v. Palgrave*. The words "if there should be but one such child," upon the natural construction must mean one child left at the death of the survivor. It would be impossible to raise an ambiguity upon that in any other case than that of parent and child. In any other case the answer would be, that the Court had no right to say otherwise; for the money would have been in the hands of Lord Gower; and no trust upon it. But Lord THURLOW went this length; that in the case of parent and child a child having attained the age of twenty-one, and having occasion for a portion, though dying in the lives of the parents, is a child living at the death of the survivor. He certainly goes that length upon the intention; observing, that the words were very strong and difficult to manage. *Willis v. Willis* is also a very strong case; though distinguishable in some circumstances: but if that had been matter of contract, where the relation was not considered, the decision could not have been, as it was, upon those words.

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I agree, in this case there are words difficult to manage: but the intention of the settlement, I mean the natural intention, regarding it as the case of father and child, must direct me, and these cases authorise me to struggle with language; for it is struggling with language; and it does not follow, that because cases are put, in which I could not struggle effectually, that I cannot prevail in the case, that has happened; if the words will bear me out in that according to the rules and authorities. Upon the true intention of this settlement, in possession upon

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these cases of this rule, that *primâ facie* a child having attained twenty-one or marriage, is to be considered a child entitled to a portion, upon the ground, that I shall not impute to a father the intention to leave a child, having occasion for a portion, without one, it is upon those, who say the child is not entitled, to shew that from the tenor and words of the settlement; and it is not enough for them to argue, that they have manifested that, because they have pointed out another case, in which it would have been impossible for the Court to have said, that child was entitled. If upon the words she is entitled in the case, that does exist, the Court would rather give the portion than struggle to oust her of it, because in another case they would have struggled ineffectually. In this settlement the trust is prior to the estate tail. In that respect it is not like *Wingrave v. Palgrave*. But unquestionably it is a legal estate in remainder during the life of the father; and if there is a contingency, it is not in the creation of the term, but in the expression of the trusts. As to that the words are exceedingly difficult to manage; and I cannot go the length of *Mr. Mansfield*, that the words "living at his decease" mean "born in his life." The words *immediately following, "or afterwards born alive," give a clear meaning to that; for though modern decisions have held, that a posthumous child is to be considered a child living, that was not clear in 1799; when this settlement was made; and therefore these words are thrown in. I am therefore not authorised to say, there is not a contingency, properly expounded for the defendants. But the case of *Woodcock v. The Duke of Dorset*† is a direct answer to that; establishing expressly, that notwithstanding the contingency the portion is vested according to the natural meaning of the words.

It is said, if there was no younger child at the death of the father, none of these younger children could have had their portions. I do not conceive that. It might have been as well argued in *Woodcock v. The Duke of Dorset*; in which case it is clear, that in that event Lord THURLOW must have held, that they would have had it; and in fact has held, that if they married or attained twenty-one, though they died in the life of both parents, they would have been entitled. There is not a word in the

† 3 Br. C. C. 569.

context to sustain that opinion in that case. There is considerable context to support it in this. The legal term existing, if it could be said to exist at law, though all died in the life of the father, they should take.

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But it is not necessary to decide that here ; for, if they could not have taken in that event, does it follow, that a child is not to take, when, there being some children surviving, the term not only exists, but the trusts are to be executed for some children ? Consider the words, and the question ; which is, whether, in case there is any child living at the death of the father, for whom the trusts ought to be executed, a child, who attained twenty-one or married, but died in the life of the father, is one of the objects of the trust, that is to be executed for somebody. In this case and upon these authorities I should say, the words "such child" must refer to the immediate antecedent "all and every the child and children," except an eldest or only son, not qualified by the contingency. Upon the clause as to what is to be raised in the life of the father, if the words introducing the *contingency are to determine the character of the child, and no child but one living at the decease of the father is entitled, how is the power to be exercised, and the proviso to have effect ? It may be said, the father may direct such a child to take, even though the contingency should not happen, upon which the trusts of the term were to be exercised. There is not a word in the settlement in support of that ; and that would be as strong a construction to support the act of the father as I am making to support this according to former cases. The other clauses relied on for the plaintiff do not afford all the argument, that has been attributed to them. The expression as to survivorship still includes the question, who are entitled to portions.

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Upon the whole I have a strong inclination, if I can, to construe this in such a manner as to hold the daughter entitled. The authorities go full as far : many of them a great deal farther. With that inclination I do not hesitate to say, it would be better to construe all instruments according to their terms, and not to spell out what they might have meant. I should have had great difficulty in going the length of prior authorities : but as they have gone so far, it is my inclination, and I think,

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my duty to follow them. I should have no objection to have this case spoken to again: but if that course should not be taken, and I should not mention it before the first day of causes, you will understand it is my opinion, that this may be supported.

A decree was made; declaring, that Mary Hope had a vested interest in one-third of the sum of 5,000*l.* and that the same with interest at the rate of 4 per cent. from the death of Eliab Breton ought to be raised by sale or mortgage.

[*Note*.—The above cited case of *Willis v. Willis* was expressly decided by LORD LOUGHBOROUGH upon the ground that it did not differ in any substantial circumstance from *Cholmondeley v. Meyrick*.—O. A. S.]

1801.
July 27.
Dec. 5.

SITWELL v. BERNARD.†

(6 Vesey, 520—544.)

ELDON, L.C.

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Testator directed the residue of his personal estate, subject to the payment of legacies, annuities, debts and funeral expenses, with all convenient speed to be laid out in real estates, to be settled in strict settlement; and that the interest of such residue should accumulate and be laid out in lands to be settled in like manner. Various circumstances having delayed the collection and investment of the personal estate, the tenant for life was held entitled to the interest from the end of a year after the death of the testator.

General rule, that legacies, where no interest is given by the will, shall carry interest at 4 per cent. only, and from the end of a year after death of the testator; except where it is given by way of maintenance; though the fund produces more; and the interest shall not be increased by the effect of appropriation.

A legatee having taken a mortgage in part payment subject to an agreement for payment out of the other assets and a resumption of the mortgage, was held entitled to the benefit of that agreement; accounting for the difference of interest.

FRANCIS SITWELL by his will, dated the 5th of February, 1792, gave to his wife 1,000*l.* a year during her life, as a jointure and in lieu of dower; and directed the same and all other annuities given by his will to be paid half yearly clear of all deductions; the first payment of them to be at the expiration of six months

† *Note*.—*Allhusen v. Whittell* (1867) life of residue in the absence of any direction for accumulation.—O. A. S. L. R. 4 Eq. 295, 304; 36 L. J. Ch. 929, defines the interest of a tenant for

after his decease; and he also gave to his said wife his house near Sheffield, called Mount Pleasant, with the appurtenances, together with the use of the furniture belonging to the house for her life; and after her death he gave the furniture belonging to the said house to his executors, to be sold and go as part of his personal estate, and he gave to his wife his town house in Audley Square with its appurtenances, together with the use of the furniture belonging thereto for her life; and after her decease he gave the same to his executors, upon trust to sell his said town house, and to divide the net money arising from the sale thereof equally between his two sons Francis Sitwell and Hurt Sitwell.

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The testator then reciting, that Samuel Phipps under the trusts and powers in his (the testator's) late uncle's will had devised the real estates in the county of Northumberland, which were devised to the said Samuel Phipps by the testator's uncle, in trust to be settled on the testator for life, with remainder to his son Francis Sitwell for life, with remainder to trustees to preserve contingent remainders, with remainder to his (Francis Sitwell's) first and other sons successively in tail male, with divers remainders over, gave to his said son Francis Sitwell, considering, he would be entitled to the said Northumberland estates on his death, the sum of 20,000*l.*; and he gave to his son Hurt Sitwell 30,000*l.*; which sums he directed to be paid to them respectively on their attaining their respective ages of 21; the interest of which said respective sums was (after applying thereout respectively what his executors should think reasonable for their respective maintenance and education) to accumulate from the time of his decease at the rate of 4*l.* per cent. per ann. for the benefit of his said two sons *respectively, to be added to the principal, until the said principal sums should become payable; and it was his will, that his executors or the survivor of them should have power at his or their discretion to advance any part of the said sum of 20,000*l.* and 30,000*l.* respectively for the purpose of placing out or advancing his said sons Francis and Hurt or either of them in life, before such son should attain the age of twenty-one years; and in case his said son Francis should die under the age of twenty-one years, then the testator directed,

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that his said legacy of 20,000*l.*, or so much thereof as should not have been applied or advanced, as aforesaid, should sink into the residue of his personal estate. The testator gave a similar direction with respect to the legacy of 30,000*l.* given to his son Hurt.

The testator then gave to his grandson Charles Wake 5,000*l.*, to be paid him on his attaining the age of twenty-one, if he should live to attain that age; but not to carry any interest in the mean time; and if he died under that age, then to sink into the residue of his personal estate. He gave to his sister-in-law Catherine Warneford an annuity of 400*l.* for her life and 500*l.*; to each of the children of his late niece Catherine Slater 400*l.*, to be paid to sons at twenty-one, or to be sooner applied for their benefit, if his executors should see fit, and to daughters at twenty-one, or days of marriage, which should first happen; to Richard Slater 200*l.*; to his niece Jane Heaton an annuity of 100*l.* during her life for her separate use and 100*l.*; and in case she should marry and leave issue, to each of her children 200*l.*, to be paid to sons at twenty-one, or to be sooner applied for their benefit, if his executors should see fit, and to daughters at twenty-one or days of marriage; and he directed, that interest at 4 per cent. should be paid in respect of the legacies given to the children of his late niece Catherine Slater from his decease, until their respective legacies should become payable, as aforesaid, and also in respect of the legacies given to the children (if any) of his said niece Jane from her decease, until the said legacies should become payable. He then gave several annuities and legacies, some to servants; and directed, that the several legacies and annuities before given should be paid without prejudice to any sums, which should be due from him to any of the legatees or annuitants; and he directed his executors to continue some weekly and other allowances * to some poor persons at Renishaw in Yorkshire during their lives; and he gave the furniture, plate, books, linen, china, wines, carriages, horses, and effects, whatsoever, which should belong to, or be in or about his house, offices, and grounds, at Renishaw at the time of his decease, to his eldest son Sitwell Sitwell for his own use and benefit; and directed his executors to pay any annuities or legacies, which by any writing

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under his hand or signed by him at any time thereafter he should direct or appoint to be paid.

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He then gave all his personal estate unto his executors for the purpose of paying his said legacies and annuities and his debts and funeral expenses, and such other legacies and annuities as he might thereafter give; and subject and without prejudice to the payment of any legacies, annuities, debts, and funeral expenses, he directed his executors or the survivor of them with all convenient speed to lay out and dispose of the rest and residue of his personal estate in the purchase of manors, lands, tenements, or hereditaments, in England of inheritance in fee-simple in possession, to be settled, as thereafter mentioned; and directed, that the interest of such residue of his personal estate should accumulate and be laid out in lands to be settled in like manner as he had directed the residuum of his personal estate.

The will then directed the limitations of the estates, so to be purchased, in strict settlement to the testator's eldest son Sitwell Sitwell for life, without impeachment of waste, with remainders to his first and other sons successively in tail male, then to Francis Sitwell and his sons, Hurt Sitwell and his sons, Charles Wake and his sons, respectively, in the same manner; and the ultimate remainder to the testator's right heirs; with powers for his son and grandson, when in possession, to grant leases, not exceeding twenty-one years; and he declared, that the legacies and estates therein before given and limited to his said three sons Sitwell, Francis, and Hurt, by that his will, were on condition of their joining, as to his son Sitwell as soon as might be after his decease, and as to his sons Francis and Hurt as soon as might be after they should respectively come of age, in such acts, deeds, fines, recoveries, and assurances, as his executors should require to confirm Phipps's disposition of his (the testator's) uncle's estates in the county of *Northumberland; and in case any of his said sons should within twelve months after such respective times, as aforesaid, refuse so to do, they should forfeit the legacies and estates thereby given to them; and the benefit of such legacies and estates so forfeited should go as part of the residuum of his personal estate. He appointed Thomas Bernard and Richard Huddleston executors, and guardians of his sons Francis and

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Hurt, until they should attain their respective ages of twenty-one; empowering them to place out any monies, part of, or arising from, his personal estate, which should come to their hands by virtue of his will, or any monies, part of his personal estate, which they should retain as a fund to answer the payment of his legacies and annuities, on real or Government securities, and to change the securities. Then, after the usual clause of indemnity, he requested, his son Sitwell Sitwell would settle his house, called Mount Pleasant, after the decease of his wife, with the grounds, &c. in such manner that it should be enjoyed as an hospital for the benefit of the town of Sheffield and neighbourhood.

By a codicil, dated the 13th of December, 1792, stating among other things, that his wife had died since his will, he gave to his son Sitwell Sitwell all his plate, linen, and china, which was given to his wife; and directed, that the diamonds and jewels should be valued, and made into three separate lots of equal value, to be divided between his three sons; and he gave to his said sons Francis Sitwell and Hurt Sitwell 10,000*l.* each in addition to the said sums of 20,000*l.* and 30,000*l.* given them respectively by his said will; the said sums of 10,000*l.* each to be paid to them at the same times and upon the like events and with the like interest as directed concerning the said sums of 20,000*l.* and 30,000*l.* by his said will. He gave to his daughter-in-law Mrs. Sitwell Sitwell, in case she should survive her husband, an annuity of 400*l.* for her life, in addition to her jointure, to be paid half-yearly: the first payment to be made at the end of six calendar months after the death of his son Sitwell Sitwell; to his grand-daughter Mary Alice Sitwell 2,000*l.* to be paid on her attaining twenty-one, but not to carry interest in the mean time; and if she should die under that age, then to sink into the residue of his personal estate. Then, after some farther pecuniary legacies, specific legacies of linen and furniture, and some annuities, *the first payment to be at the end of six months after his decease, he gave to the Lying-in Hospital, to which his wife was a subscriber, 200*l.* to be paid out of his personal estate; and reciting, that since the making of his will the trustees of the Sheffield Infirmary had fixed upon a site for building an infirmary, towards which he had subscribed 500*l.* he gave to the

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trustees of the said infirmary the farther sum of 500*l.*, to be paid out of his personal estate towards the building of the said infirmary. He revoked the request in his will respecting his house and grounds at Little Sheffield being settled by his eldest son to be enjoyed as an hospital; and gave the said house and grounds to his said son Sitwell Sitwell, his heirs and assigns for ever. He empowered and directed his executors in the settlement directed of the manors, lands, &c. to be purchased with the residue of his personal estate, to secure, charge, and make payable, out of such manors, &c. to be purchased with the residue of his personal estate, the sums given or directed to be paid by his will and codicil for the benefit of the several annuitants and other persons; and he gave Thomas Bernard the annual sum of 200*l.* during the first seven years after his decease, as a compensation for his loss of time, but not as a satisfaction for his expenses in the execution of the will; and he directed all the legacies and annuities by the codicil to be in addition to those by the will.

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By another codicil, dated the 28th of July, 1793, the testator gave a legacy of 100*l.* He died in September, 1793; leaving a personal estate amounting to upwards of 150,000*l.*; a considerable part of which being outstanding on large mortgages could not be got in; and in Michaelmas Term, 1797, the bill was filed by Sitwell Sitwell; praying the necessary accounts; and that it may be declared, that the plaintiff is entitled to the interest of the clear residue of the personal estate, not specifically bequeathed, so far as such residue had not been laid out in the purchase of land under the will, from the end of one year after the testator's death, or such other period as the Court should be of opinion the plaintiff was entitled thereto; that such interest might be paid to the plaintiff; that such parts of the residue as had not been laid out in the purchase of lands might be so laid out according to the will, and subject to the payment of the said legacies to the defendants Hurt Sitwell, Charles Wake, and Mary Alice *Sitwell; that the plaintiff may be let into possession of the estates, when purchased, subject to the annuities, &c.; and that in case the Court should be of opinion, that the legacies given to Hurt Sitwell ought then to be provided for out of the

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personal estate not specifically bequeathed, then that a sufficient fund might be set apart out of such personal estate to answer the same, in case he should become entitled thereto; and all necessary directions, &c.

The decree, pronounced in 1798, directed the usual accounts and payment of the legacies and the arrears of the annuities; and an appropriation to answer the legacies to infants and the annuities: an inquiry, what steps had been taken to get in the personal estate outstanding upon securities; that the Master should state the clear residue, and how it had been disposed of, and distinguish what part consisted of principal, and what part had arisen from interest, from the end of twelve months after the testator's death.

The Master by his report, made in November, 1800, stated the accounts; and that all the legacies had been paid except the legacies of 80,000*l.* and 10,000*l.* to Hurt Sitwell and the 5,000*l.* to Charles Wake, and 2,000*l.* to Mary Alice Sitwell. Hurt Sitwell attained twenty-one on the 26th June, 1799. Francis Sitwell attained twenty-one in October, 1796; and soon afterwards applied to the executors for payment of his legacies; when they informed him, that having contracted for the purchase of an estate, which would require great part of the money then in their hands, they could not without great inconvenience to the trust pay him the whole in cash; but they were willing to pay him in the following manner; in cash 12,500*l.*, and the remaining sum of 17,500*l.* part of a mortgage debt of 88,000*l.* due to the testator, secured upon the estates of the late Saville Finch, Esquire. Francis Sitwell in answer stated, that in order to benefit his brother he was willing to receive his legacies in the manner proposed, upon condition, that the executors should out of the first monies, which should come to their hands, pay him the said sum of 17,500*l.* and resume the mortgage; which they agreed to. In consequence of that he accepted the 12,500*l.* and a transfer of the *mortgage; and in April, 1798, on his application to the executors to resume the mortgage a memorandum, dated the 16th of April, 1798, was signed by Francis Sitwell and the executors; stating, that it was understood and agreed, that the mortgage of 17,500*l.* shall be taken back; and the mortgage

money paid to Francis Sitwell out of the monies expected to be shortly paid in part of a mortgage of 51,000*l.* due to the testator's estate ; part of which had been lately paid to the executors, and applied by them, except, 1,500*l.* lent to Francis Sitwell on his bond ; and the residue is in a course of payment ; and this is agreed to by the executors, as far as they can consistently with their duty and the due execution of their trust.

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The report farther stated, that accordingly on the 16th of April, 1798, the defendants advanced to Francis Sitwell 1,500*l.* upon his bond. He therefore claimed 16,000*l.* ; offering to re-transfer the mortgage ; and the executors also claimed to have that sum paid to him in part resumption of the mortgage ; which claims the Master submitted to the Court.

The report stated, that the only sums remaining due on mortgage exclusive of the said 17,500*l.* are 20,000*l.*, the balance of the said mortgage for 51,000*l.*, and another mortgage of 17,500*l.* ; that soon after the testator's death notices were given to pay the said mortgage debts : but the heir of the mortgagor for 51,000*l.* being a minor, no proceedings could be had with effect, until he attained twenty-one in June, 1796. The defendants were induced to delay filing a bill by a proposal to pay the mortgage by a sale ; which took place accordingly : but many of the purchasers not being able to complete their purchases, the defendants had been compelled to receive the money by instalments ; conceiving that more for the benefit of the testator's estate than to file bills : but from the difficulty in raising money in the present times and other circumstances 20,000*l.* still remain due.

With respect to the other mortgage of 17,500*l.* the report stated, that the executors in Easter Term, 1796, filed a bill ; and upon the 23rd of May, 1798, obtained a decree for a foreclosure : *but several orders for time had been obtained : the last upon the 20th of January, 1800, for six months.

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The report then stated, that the executors had laid out part of the personal estate in the purchase of real estates ; one of which they purchased from the plaintiff.

The questions were, 1st, Upon the plaintiff's claim to the interest of the personal estate from the end of a year after the testator's death.

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2ndly, As to the right claimed by Francis Sitwell to have the mortgage resumed by the executors, and the remainder of his legacy paid in money.

3rdly, Upon the claim of the legatees to interest at 5 per cent.

Mr. Romilly, Mr. Hollist, and Mr. Cox, for the plaintiff:

Upon the first question, there is no case precisely like this: but *Hutcheon v. Mannington*† bears a strong analogy. That was the case of a legacy, given over, if the legatee should die, before he might have received the legacy. This residuary disposition would be very clear, except for the latter part; for the persons beneficially entitled could not be prejudiced by the negligence of the trustees; who would have been bound to lay out the fund at the end of a year after the death of the testator. The latter part of the clause would be satisfied by the interest accumulating within the year, the usual time allowed for the executor to collect the property. Another way of satisfying those words is by referring them to the legacies to his grandson and grand-daughter, directed not to be paid till the age of twenty-one, and not to carry interest in the mean time. This is to be considered, as if the plaintiff had no other provision under the will. He could not mean, that the executors should have the power of delaying the investing of his personal estate in land, as long as they thought proper. They delayed three years, before they even took steps to call in the mortgages. They might have had a decree *nisi* against the infant *mortgagor. But the other mortgagor was of age. * * *

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[*Note.*—Upon this question they also cited *Entwistle v. Markland* (1795), and *Stuart v. Bruere* (1785), stated in a footnote 6 Ves. 527, 532; both of which cases are also for the purpose of this report sufficiently stated in the judgment in this case.]

Upon the second question, Francis Sitwell having taken this mortgage is now bound; and cannot insist on having his whole legacy out of the personal estate, a deficient fund. He would have been entitled to interest upon his legacy at 4 per cent. only; and upon the mortgage he has received 5 per cent.

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† 2 B. R. 115 (1 Ves. J. 366).

Mr. Mansfield and Mr. Hart, for the infant tenant in tail remainder, defendant :

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In this case the will is to guide the Court. The residue is never supposed to exist till the end of a year ; upon the supposition, that by that time the executors will have collected assets enough to pay the debts and legacies, and that previously to that period they are employed in getting in the assets. In this case the interest is to be calculated upon the residue ; and that does not exist legally before that period. The interest therefore cannot stop then. It is impossible to refer these words to the interest of the two legacies. That is not the interest of the personal estate. It probably occurred to the testator, that the mortgages could not be got in till after a period much longer than a year. One mortgage is for 50,000*l*. Knowing that, he might mean the interest to accumulate, and become a fund for the purchase of real estates as well as the principal. The plaintiff might have filed a bill, and compelled the executors to call in the money as soon as possible. * * *

The *Solicitor-General* and *Mr. Huddleston*, for the defendant Hurt Sitwell :

Notwithstanding the words of the will, the legacy ought *to carry interest at the rate of 5 per cent. instead of 4 ; being given out of a fund bearing 5 per cent. In *Lewis v. Freke*† this point of interest was much considered. Lord HARDWICKE was in favour of the higher rate of interest : *Beckford v. Tobin*,‡ *Denton v. Shellard* ; § saying, the nature of the fund is to be considered. In 1799, when this legatee was of age, it was impossible to raise the money even at 5 per cent.

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Mr. Murray, for the defendant Francis Sitwell, the second son :

Insisted, that he was entitled to his legacy out of the first assets, that come in ; stating, that he was not dissatisfied with the agreement ; but that it was not carried into execution according to the purport of it ; and the executors had a sufficient

† 2 R. R. 301 (2 Ves. J. 507). ‡ 1 Ves. Sen. 308. § 2 Ves. Sen. 239.

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Mr. Romilly, in reply :

They do not argue, that the executors might take as much time as they please ; and prevent the tenant for life from having any benefit : but they must make out that proposition. It is clear, the testator was not speaking of the residue after all the debts and legacies paid ; for he directs it without prejudice to the payment of the legacies, annuities, and debts. Upon the other construction the words “ with all convenient speed ” must be struck out. There was no laches in the plaintiff. The circumstance, whether a bill is filed, or not, cannot alter the duty of the executors : but suppose, it was the case of an infant, what good reason can be assigned for not filing a bill of foreclosure for three years ? The indulgence to the mortgagor by enlarging the time ought not to prejudice the rights of others. In *Stapleton v. Palmer* † the same question occurred.

The question attempted as to the interest is perfectly new.

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The LORD CHANCELLOR having stated the case, delivered the following judgment :

Under the circumstances appearing in the Master's report it was impossible for the trustees to call in a very considerable part of the personal estate ; attending to those obstructions, which perhaps a wholesome attention to the convenience of those, who are debtors, throws in the way. This testator had a very large personal estate out upon security ; partly upon a mortgage affecting the estate of an infant, under that species of embarrassment, that it was very material for him, when of age, that a considerable part of his property should be sold ; and the arrangement for payment to the estate of the testator took this course ; that the purchasers should from time to time pay to the trustees of this will the purchase-money in part discharge of that debt ; and perhaps that was as convenient and as expeditious a mode as any, that could be adopted ; without prejudice undoubtedly to their personal remedies, if they had any ; for the infant was not an

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obligor in the bond made upon the mortgage. It appears also, that a considerable part of the personal estate was secured upon a mortgage by Lord Mulgrave; and the executors, as far as they had it in their power to take remedies against the real estate charged with that debt, took those steps certainly not so speedily, as they might. Few steps were taken to call in a considerable part of the personal estate for four years; for, after they did begin, they found, they were embarrassed by the circumstances of the times; which produced from this Court an enlargement of the time of foreclosure; carrying it over a considerable period: an equity, which binding the testator also bound his devisees. The estate obviously consisted of a great variety of securities, which, to render them productive, would occasion great expense and delay; and it might have consisted of securities hardly saleable, much less of such, upon which the money was capable of being collected.

The case was reasoned for the tenant for life in this way; that under such circumstances, and in all cases of personal estate directed to be so laid out, considering, what it might be, it is incumbent upon the Court to adopt a period, at which it should be considered as laid out with regard to the interests of the tenant for life and those in remainder. The case afforded great difficulty in the terms of the will; providing for an accumulation of interest; and directing the interest accumulated to be laid out upon the same trusts in the purchase of land as the bulk of the property producing *the accumulation. In answer to the suggestion, that an application should have been made by the tenant for life to have the trusts executed, the case of an infant was put strongly and fairly. The plaintiff happened to be of age: but if he had died, leaving an infant son, in which case the trustees ought to have acted, as if a bill had been filed, the question would have arisen, what the Court ought to do upon a bill filed by the infant, when adult. It was also very strongly said for the plaintiff, that the case ought to be considered, as if he had no other provision under this will. It is true, he has real estates under it: but put the case, that he had not; and that he was to derive an interest, and that a life interest only, in the investment of the personal estate in land: what ought to be the

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construction as between him and the persons in remainder ; if it happened, that a great part or the whole was subject to difficulties and embarrassments in the collection, which the testator could not have foreseen ? It may be asked, are the trustees immediately to file bills of foreclosure, whether prudently, or not ; to admit no arrangement ; to bring actions upon the bonds, and the covenants ; to file bills for the purpose of following the assets of the original mortgagors ; to institute every species of legal diligence in every case, in which it might be wholesome, and might perhaps be as prejudicial to the interests of those in remainder by bringing into hazard the bulk of the personal estate, in order to forward the perception of interest by the tenant for life ?

In this view of the case a very considerable question arises upon the construction of the will, addressed to the discretion of the Court. The first consideration with reference to that is, how far the Court had in other cases construed instruments somewhat similar in their terms : and in effect how far the Court had assumed such discretion, as enabling them upon the whole to make a useful and wholesome construction of such a will between particular interests and those entitled to the bulk of the property. However difficult in the first instance to adopt such a construction, if, in different instances such wills have been so construed, it would be very hazardous upon this will, almost in terms affording such a construction, not to adopt it : not only with reference to the case itself, but because the refusal to adopt it, even against strong words, incurs the hazard of bringing into question those decisions. *The first case upon words similar, but very far from the same, is *Hutcheon v. Mannington*,† before Lord Thurlow. The construction Lord THURLOW thought himself of necessity obliged to put upon the words I thought then was too bold, if I may presume to say so. His Lordship thought, there was an indication of a purpose, such as was contended for by the plaintiff : but that it was impossible to inquire, when each and every part of the estate could have been received, collected, and got in ; and seems to admit, that he was driven by the impossibility of measuring that purpose of the testator to

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† 2 R. R. 115 (1 Ves. J. 366).

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consider it vested at his death; and he held all the legatees entitled to their legacies, though none had received them. That case is a strong authority, particularly in the passage as to the direction to sell real estate, to shew the length the Court will go upon general grounds of convenience in the construction of a will, indicating a purpose, which it is almost impossible to execute consistently with the other purpose, that the party, in whose behalf it is to be executed, shall beneficially enjoy the interest intended by the testator.

The case of *Stuart v. Bruere*† was upon a will, which applies not only to the bulk of the property directed to be sold, but goes the length of embracing also the intermediate rents and profits, before the estate should be sold; and though estates were not sold, and the intermediate rents and profits are subjected to the same trusts, the Court thought themselves at liberty under the circumstances to give to the tenant for life the beneficial interest of the money; though the sale was not actually made. The words in that will “as soon as conveniently may be after my decease” are in effect the same as those in this will. The first decree, upon the 2nd of December, 1785, somewhat more than a month prior to the end of a year from the death of the testatrix, ordered all the sales to be made, and the money to be laid out according to the will; and declared the title of Sir Simeon Stuart to the interest of the fund to be constituted by the decree. The sales being delayed, Sir Simeon Stuart presented a petition to the late Lord Chancellor; insisting, that under the circumstances, the general *intention being, that he should have the beneficial interest of the fund for his life, he ought not to be delayed in the perception of that benefit by the non-execution of the trusts: and the rents and profits of the real estate ought not to go to the capital, the sales having been delayed, when that intention was clear. The principle, upon which Lord ROSSLYN decreed, was, not taking the period of a year from the death of the testatrix as the period, from which the petitioner was to

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† The LORD CHANCELLOR having observed, that the case ending by agreement could not be stated as a decision upon the subject, *Mr. Romilly* said, the agreement was not with respect to that point: as to that

they took the decision of Lord THURLOW: upon which the LORD CHANCELLOR admitted, that the case had all the authority of a decision.

‡ See *ante*, p. 382.

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receive the rents and profits, making the necessary abatements for the interest of debts, &c., but taking the period of the decree in 1785. The difference in time was not much : but the difference in the principle is something. Lord ROSSLYN by his order, made upon the petition and a report of the state of the funds, notwithstanding the language of the decree was, that the rents and profits till the sale and the interest and dividends of the stock, till converted into money, should go to form one fund, the interest of which the plaintiff was to take, considers the sales as made in the view of this Court by the decree, which ordered them to be made ; and taking care to reserve a sufficient fund for debts and legacies, gave him the rents and profits and the interest of the fund unconverted from that period. Lord ROSSLYN seems to think, there is a principle in the justice of the Court requiring him to consider that as done, when it was ordered to be done ; differing from Lord THURLOW, who considered it as ordered to be done from the death of the testator. Lord ROSSLYN considering it as done from the date of the decree, procured by the providence of the party himself.

From these decisions therefore it is uncertain, what is the true period in the case of a person having discretion enough to file a bill, and the case of an infant : whether the death of the testator, or the decree, if a suit was instituted : or, whether the Court would say, that was a convenient period for this purpose, which for other purposes is determined to be convenient ; though it does not often hit the real justice of the case, viz. a year from the death of the testator.

The next case is *Entwistle v. Markland* ; † as to which I am clear, the register has not correctly taken the declaration of the principle of the Court as to the interest of the tenant for life. That declaration is not very consistent ; and it goes beyond the *declaration of the Court. It is quite clear from the proceedings and the report, that the person, who got the rents and profits, though tenant for life in remainder, got the produce of property, that no diligence of the executors would have enabled them to collect and get in. The words of that will are nearly the same as in this. The codicil also brings it very near this case. It appeared, that several parts of the personal estate were out upon

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† See *ante*, p. 332.

securities such in their nature, that though at first probably very convenient securities, upon mortgage, they had become otherwise; and it was quite impossible, that they could be got in. The terms of the will therefore connected with the evidence adverted to personal estate, directed to be got in with all convenient speed, which could not possibly be got in; and was not left outstanding from negligence and dilatoriness of the executors. The principle of Lord ROSSLYN upon that must have been mistaken in the decree upon my own recollection and a comparison of the ordering part of the decree with the declaration as to the principle. The principle of the first part of the declaration is obviously right; for if the personal estate was got in, and not applied, it was dilatoriness; which should not prejudice any one. It is inaccurate in first supposing all the personal estate got in, and in the latter part supposing, that only part had been got in. But upon the report it appears, not only, that great part had not been got in, but, that with no diligence it could have been got in. The claim therefore of Robert Entwistle, the first taker for life, was left out. But the decree afterwards, goes on to order, that the plaintiff shall have the interest of that part of the personal estate. Lord ROSSLYN's opinion must have been, that the embarrassments the state of the property created made impracticable the general purpose, that the tenant for life should have the enjoyment of the interest of the property; and he seems to have been of opinion, that he had no option. But it amounts nearly to destroying the natural effect of the one or the other part of the will. Lord ROSSLYN thought, the best construction was to further the enjoyment of the property, as the testator meant it.

This case then does not come on unprejudiced by decision; for under the circumstances upon the report, the delay in receiving the money, certainly occasioned in part by the trustees delaying, (I desire not to be understood to say, culpably) for three years, perhaps *very wisely, and in all instances forbearing to sue upon the personal remedies, as well as the remedies attaching upon real estate, perhaps most wisely for those in remainder by not destroying the means of the debtors to pay, agreeing to take payment by sale of the mortgagor's estates, and in parcels, instead of foreclosures, which the Court has not

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disapproved, considering the great expense and delay of proceeding in that way, with no dilatoriness, but upon circumstances, which the law of this Court considers reasonable grounds for delay, under all these circumstances, the cases, to which I have alluded, have not left me to struggle with the difficulties, that would have occurred, if this had been an original case untouched by prior decisions. Without saying, what my opinion would have been upon the question originally, I cannot say, I will give the tenant for life no relief, without saying, the decree in *Entwistle v. Markland*, a case nearly in *ipsissimis terminis*, is wrong; that *Stuart v. Bruere*, which, though not so precisely, is very nearly, this case, is wrong; and that what Lord THURLOW hinted to be a provident and due construction of the will before him was wrong. But I think, those cases are founded upon a principle, which if the terms of the will allow you to make such a construction, is bottomed in evident convenience; and I lay great stress upon this; that it is the very best construction for those, who are to object to the claim of the tenant for life. This Court will look at principles of convenience. Where an estate is given in various legacies, and the residue is given, it is a rule of convenience, that authorises this Court to say, for there is no language in the will for it, that those legacies shall be payable at the end of a year from the death of the testator; because as a general rule it may be taken, that the personal estate may be collected within a year; though in many instances that falls enormously to the prejudice of the residuary legatee. The same convenience has made the Court say, the residuary legatee shall not claim till the end of the year. In many cases the Court supposes the residue to carry interest: though in many cases the residue does not carry interest; but the Court takes the interest for a particular legatee from the residue; as a general rule of justice and convenience; though in many instances falling out against an individual. There are other cases before Lord HARDWICKE upon the point, whether interest at 4 or 5 per cent. shall be paid upon legacies; and prior cases in *Peere Williams*: the Court *attending to the productiveness of the fund, or the contrary. But now it is a general rule, that where no interest is given by the will, except where it is given by way of mainte-

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nance, it is only to be allowed at 4 per cent. from the end of the year;† though it may appear to have produced in the period interest at 5 per cent. Particular justice is disappointed in particular cases: but upon this principle, alluded to by Lord THURLOW in *Hutcheon v. Mannington*, that the inquiry as to the state of the personal estate, when each and every part could be got in and made productive, is endless and immeasurable, the Court cuts the knot by doing what in general cases is convenient; though in particular cases both convenience and justice may be disappointed.

In this case the property is large; and that circumstance as well as the consideration of justice and convenience made me hesitate: but the principle cannot be different on account of the amount of the property. The question is, whether there is too much in this will to prevent me from adopting that rule of convenience, that has been adopted in the other cases. *Entwistle v. Markland* disposes of the objection from the clause as to accumulation of interest of the residue. That case also answers the objection from the power given to the trustees to call in money, and lay it out upon interest, before it should be laid out in land. The case must be considered, as if this was the only provision for the plaintiff; and it is to be considered, not only as a case, in which part might be got in, and part not, but as if all the personal estate was subject to the same embarrassment; and the question then is, attending to the accumulation, whether upon the whole will, considered upon the principles of the Court and the decisions, the testator could mean, that if the property could not be cleared in the whole life of the tenant for life, the interest of the tenant for life was to be wholly disappointed. We are apt to lay hold of circumstances, though too critical, if they will assist in collecting the general purpose. Without straining the construction of the word "residue," though, I admit, in general it is such as is contended for the defendant, there are circumstances, which may produce accumulation, that may be taken to answer the direction as to that. Annuities are directed by the will to be paid out of the personal estate. By the codicil they are charged upon the land, when the personal estate shall

† *I.e.* where there is an express direction to accumulate.—O. A. S.

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be invested in land. It would *be singular, that the testator should mean the annuitants to receive their annuities before investment, and that the tenant for life should remain in a situation to get nothing. As to the legacies, some carrying no interest, others carrying interest, less perhaps than the fund might produce, there would be an accumulation of interest upon those ; and though in a sense that would fall within the reach of the word "residue" yet he might have meant to apply the direction of the will as to accumulation more strictly ; and I would struggle for any construction rather than adopt a construction, which, not from dilatoriness of the trustees, but only from circumstances, to which probably the testator did not look, has a tendency wholly to disappoint the intention as to the beneficial enjoyment. If the words of the will allow me, I ought to follow these decisions ; and the necessity of not following them is very much weakened by the words of those wills. They have left in uncertainty the period, from which the tenant for life of the land, when purchased, was to commence with regard to the enjoyment of the interest of the personal estate, in the contemplation of this Court real estate, but not actually become so ; which imposes upon the Court considerable difficulty. Lord THURLOW's rule is put upon the naked case of an estate directed to be sold, no burthens upon it, &c. Lord ROSSLYN in the first case takes the decree within the year. *Entwistle v. Markland* goes upon a rule like neither of the preceding cases. It is not the right rule to say, that, where a decree is obtained, directing a trustee to do some act, the time is that of the decree ; for the language of the decree is no more than the language of the will. The Court orders it to be done only because the testator has ordered it to be done. The Court cannot mean, that the decree, because the money was not laid out in convenient time, is to give date to the enjoyment of the property ; as if it had been laid out in convenient time. If the trustees have not done what they ought, the Court orders it without prejudice to the interests of the persons entitled, as if it had been done. In *Stuart v. Bruce* Lord ROSSLYN gave the interest prior to the end of the year, probably, because he saw in the report, that he could have provided for the interest of the debts and legacies at the time of

the decree. Upon the dry case put in *Hutcheon v. Mannington* the Court had not to encumber itself with the payment of debts out of the produce of the estate, or the time necessary for inquiring, what debts there *were. That case therefore does not apply to this; and upon the whole, if the Court can adopt a general rule of convenience, it must be, that it will act upon the enjoyment of the tenant for life at that period, when upon its own rule it supposes the purposes to be answered, before the fund can be cleared, can be answered: and that here it is impossible to say, the tenant for life can have the interest of the residue before the time, when the fund can be constituted by an investment in land clear of debts, legacies, and annuities; when all those can be provided for. The plaintiff therefore must wait one year.

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The question then will be, whether he is to wait longer; and if so, whether he must not of necessity wait, till the personal estate can be actually collected. Part may be collected from time to time in his life; and he might enjoy the rents and profits of the estates purchased with those parts. But it might happen, that no part might be got in in his life. Suppose, these debts on mortgage were the only part of the personal estate: it is impossible to say, when either of those funds could be realized. The Court is therefore driven either to take the end of the year upon the principle of general convenience, or to examine in each particular case, what convenient speed and reasonable diligence would have done: what negligence or the law of the country or other circumstances have prevented; and make those inquiries at the hazard of obtaining no clear result. I am therefore disposed to say, justice requires, that the plaintiff should have the interest from the end of the year; and the more so, because I am clear, that distributing that justice to him is consulting the essential interests of the persons in remainder; for then from his death they will have the benefit of that, whether the fund is converted into land or not; and if that is not done, the rule may press as hard upon them; and some of them may have no actual enjoyment of the money. Suppose the tenant for life should call upon the trustee to get in the money with all possible diligence: it would be very difficult for the trustee in many cases at his own risk to determine, that he would not take all the

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remedies competent to him ; and unless by this sort of equalizing rule, if I may call it so, we give a discretion to the trustees to make a husband-like management, the tenant for life might insist upon a bill being filed ; or enter upon the estate ; or he might arrest the mortgagor ; *or bring actions of covenant. The trustees might say to the tenant for life, he would not put the property in risk ; but he would be bound upon an inquiry in this Court to shew a solid reason for objecting to the proceeding. The consequence would be in every instance an inquiry, whether the trustee acted reasonably, or not. What a waste of property disputes arising out of such circumstances would occasion ; even if the property should be eventually got in : but we know, securities are put in great hazard by too much pressure : and these considerations lead me to think, there is a strong analogy in the general rule ; which in many instances is not applicable to particular circumstances : and I am justified upon the whole, though I have had great difficulty upon it, in saying, the construction ought to be that, which will give the tenant for life the interest from the period, at which in the contemplation of this Court the residue would be formed as residue ; viz. the end of the year, conceiving it hard upon him to take the time of the decree : recollecting, that the former decree directs an inquiry, as to what had been done, without directing the money to be called in ; which certainly it ought upon that principle.

The directions must be such as to provide for an appropriation as to legacies and annuities ; as to legacies, both such as carry interest less than 5 per cent., and such as carry no interest till the time of payment. In the appropriation as to legacies it would be fit to consider, whether the necessity of appropriating may not give the legatees a larger interest than is given by the will, upon *Green v. Pigot* : † but there have been other cases since, in which it has been held not to be the legitimate effect of appropriation to give a larger interest, than if there was no appropriation.

The second point is, whether the legatees are entitled to more than 4 per cent. ; and particularly one, who had taken a mort-

† 1 Br. C. C. 103.

gage for his legacy. As to the general point I have taken it to be clearly settled, that, where no rate of interest is given by the will, the Court gives 4 per cent. ; and where any rate of interest is directed by the will, the Court gives that; and there is no reason from particular circumstances to depart from the general rule as *to legatees. The cases cited from Vesey shew, that it was not at that time a settled rule, whether there should be 4 or 5 per cent. ; but that it was rather the inclination of the Court to give 5, as to personal estate, particularly if producing interest. But that rule, I take it, has been altered ; and the general rule is, as I have stated. One case,† that was cited, does not bear upon it : a person charging under a power had given 5 per cent. ; and the Court said, he might, if he did not give more than legal interest.

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As to the transaction of the mortgage, there is no doubt, Francis Sitwell, when of age, might take payment of his legacy by a mortgage, if he thought proper : and feeling, that it would be attended with inconvenience, might make a bargain, that, when the estate should produce money enough to pay him, they should take it back again. That seems to be the agreement. I understand, he will not take finally to the mortgage ; and, if not, the transaction is undone : and he puts himself back to the situation of legatee ; and then in the account he must give credit for the difference between 4 and 5 per cent. received in the mean time. If he holds to the mortgage, it is so much payment ; and he will keep the 5 per cent.

SMART v. PRUJEAN.†

(6 Vesey, 560—567.)

1801.
Dec. 11.

ELDON, L.C.

[560]

Legacies out of real estate, given by an unattested paper, cannot stand, unless that paper is clearly referred to by a will duly executed ; so as to be incorporated with it : in this instance there being no such clear reference upon the contents of the instrument, the legacies failed : the circumstance, that a paper was found inclosed in the same cover with the will, indorsed as his will, not being sufficient.

ANTHONY LOWE, a Roman Catholic priest, of Gravelines in Flanders, being seised in fee of some real estates in England, by

† *Lewis v. Freke*, 2 R. R. 301 (2 Ves. J. 507). † See *Sidgreaves v. Brewer* (1880) 15 Ch. D. 594, 49 L. J. Ch. 514.

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his will, dated the 5th of December, 1789, duly attested according to the Statute of Frauds, gave and devised to John Prujean and his son, their heirs and assigns, his real estates, describing them ; upon trust, that immediately and as soon as conveniently might be after his decease they should sell the same ; and in the mean time and until the sale apply the rents and profits, after deducting their costs, unto such person or persons, and for such ends, intents and purposes as he, the testator, should by a private letter or paper of instructions, which he in his will mentioned he intended to leave with Mrs. Johnson, then residing at Gravelines, or with her successor for the time being, direct or appoint ; and from and immediately after the sale he directed his trustees to pay the money, which should arise therefrom, and the interest, until the principal should be paid, unto and for the benefit of such person, and in such manner, as he the testator should by the like private letter or paper of instructions direct and appoint. He gave to each of his trustees twenty guineas for their trouble ; and he gave and bequeathed all the residue of his estate, both real and personal, unto the same trustees, their heirs, executors, and administrators, for the use and benefit of such person as should be *named in the said private letter or paper of instructions ; and he appointed his trustees executors.

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The testator died at Gravelines in December, 1794. Immediately after his death, in his bureau in the room, in which he had resided, belonging and adjoining to the monastery of English nuns at Gravelines, of which Clementina Johnson, referred to in the will, was Superior, two paper-writings were found in the same envelope with the will ; which envelope was sealed up, and indorsed in the hand of the testator, "The will of Anthony Lowe."

These papers were as follows ; both in the hand-writing of the testator :

" John Prujean, Esq. and his son John trustees and executors of my will—Gentlemen, I desire, that immediately after my decease you will (previously deducting your charges and expenses in the execution of your trust) pay the rent of my houses, in case they shall not then be sold, or if sold, pay the monies, that shall arise by such sale, and the interest thereof, and transfer and

make over the securities for the same, unto Mrs. Clementina Johnson now residing at Gravelines in Flanders, or to her successor then in being, or to such other person or persons as they or either of them shall appoint. By this you will much oblige, Gentlemen, your most affectionate friend and humble servant, ANTHONY LOWE. Gravelines, April the 17th, 1789.”

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The other paper was directed thus: “Reverend Mother Abbess;” and was in the following words:

“DEAR MADAM—As to the worldly estate or effects I may die possessed of or entitled to in England, I have devised them by will to John Prujean, Esq. and his son, upon trust nevertheless that the said gentlemen shall after my decease as soon as conveniently may be sell and dispose of my messuages or tenements situate in St. John’s Street in Carlow Court, &c.; and in confidence moreover that they will after deducting their charges and expenses in the execution of their trust pay the rent of my houses, if they shall not then be sold, or if sold, pay the *money, that shall accrue by such sale, and the interest thereof, and transfer and make over the securities for the same, unto your Reverence or your successors then in being, or to such other person or persons as you or your successor shall think proper to appoint. As on the one hand I stand indebted to 40*l.* sterling to Mr. Errington, and on the other hand bequeathed two legacies of twenty guineas to my executors, I am inclined to think the sum you will receive in consequence of the sale of my property, Mr. Errington being paid, and the just mentioned legacies discharged, may amount to about 300*l.* or 400*l.* sterling. The first hundred pounds I desire Sister Winifred Clare’s acceptance of as a compensation for the loss she heretofore unfortunately sustained in her fortune. A second similar sum I beg may be placed out to interest towards the entertainment of church linen; and third hundred to be applicable to the purpose or purposes, which you or your successor may judge to be most expedient. Should the sum you receive exceed 300*l.*, the overplus I entreat you to remit to Miss Catherine Mackey, provided it does not surpass 50*l.* In case it does, what may remain in your hands after you have given her the 50*l.* you’ll be pleased to accept for your own par-

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ticular uses. As nothing more occurs to mind that I could wish to add, except that I earnestly recommend myself to yours and your community's pious prayers, and beg you will be so kind as to get fifty masses discharged for the repose of my poor soul, and one low mass yearly to the same end, I shall therefore conclude with the unfeigned assurance of how much and sincerely I am, Dear Madam, your and your community's most truly wellwisher and devoted humble servant, ANTHONY LOWE. Gravelines, April 17th, 1789.

"N.B.—The legacy projected in favour of Miss Catherine Mackey, which I confidently trust will fall to her share in consequence of the sale of my little property proceeds partly from the real esteem and regard I have for her, and more particularly from the knowledge I have of her indigent circumstances."

*563] Clementina Johnson, the abbess, died in the life of the testator. Immediately on his death the cover containing all these papers was delivered to the lady who succeeded Mrs. Johnson, as abbess. Prujean the elder died in the life of the testator: but his son took possession of the real and personal estate and the title-deeds. A caveat was entered by two cousins of the testator, claiming as his heirs at law and next of kin, against the probate of any of these papers; and they filed the bill against Prujean, and against Winifred Clare and Catherine Mackey; praying, that Prujean may be declared a trustee for the plaintiffs as to the real and the residue of the personal estates, and deliver up the possession and the title-deeds, and account for the rents and profits, and the personal estate, &c.; insisting, that the papers found with the will could not be considered as the papers intended by the testator.

Mr. Mansfield and Mr. Johnson, for the plaintiffs:

* * It is admitted, that there was no paper in the hands of Mrs. Johnson at her death; and there is no proof, that the testator ever did deliver to her any paper, expressing the purposes, to which his property should be applied. There is therefore no disposition of either the real or personal estate. * * *

Mr. Romilly and Mr. Jordan, for the defendants :

* * These papers were found sealed up with the will in a room in a house belonging and adjoining to the convent. They are therefore, though not literally in the possession of the Superior, in a house belonging to, and a part of, the convent. That qualification is only as evidence of the identity ; and under the circumstances this paper was sufficiently left with the Superior. They were sealed up with the will by the testator himself ; though dated before. The indorsement in his handwriting is sufficient evidence of that ; and that at that time he sealed them up and published them as testamentary papers, stating his intention as to his property. * * *

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The reply was stopped by the Court.

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LORD CHANCELLOR :

I am very strongly of opinion, thinking, these two legacies would be good, if the fund was well given, that there is not sufficient legal certainty, to be collected from the instrument signed by three witnesses, that the testator has disposed of his real estate. The rule goes no farther than this: (I except charges for debts and legacies): that if the produce of real estate is to be disposed of, you must shew an instrument in effect executed by the testator in the presence of three witnesses ; and evidencing from its own contents, that it is so, in a sense ; even if no attestation is annexed to it. The rule of law is, that an instrument properly attested, in order to incorporate another instrument not attested, must describe it so as to be a manifestation of what the paper is, which is meant to be incorporated ; in such a way, that the Court can be under no mistake. In that way of putting the case it is not necessary to decide, whether the testator's intention before making the will, was, if these papers are incorporated, that his will should not be consummate, till they were delivered to the Superior ; though, if the cause was decided upon that ground, I am not sure, it would be wrong ; for I can imagine, that he might have conceived a purpose of piety ; and, taking it to be the most rational purpose of piety, he might consider, that notwithstanding his purpose at that time he might have more

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favour to his relations afterwards ; and they might become as proper objects of his piety as any other ; and therefore he might intend to dispose of the money for such purpose as should be expressed in a paper he intended to leave with the Superior. I always thought the construction of *Heylin v. Heylin*† rather critical. That case, however, was decided by high authority. But I take all these papers to have been prepared on the * same day. It is a more serious thing to execute a will than to sign a letter : therefore, I apprehend, he signed the letters then ; but hesitated about executing the will till December. Judging as a private individual, there can be no doubt, that, when he executed the will, he meant, that instrument and these two letters should have their effect : but unless the rule of law allows me, I cannot establish the letters ; and I am not satisfied, he meant them to have their effect, unless delivered to the Superior ; as he might mean that to be a part of the act to make the will complete. The intention of leaving them with her can never under the circumstances, in which he lived, be satisfied by the circumstance of finding them in the convent. He was living, and had his bureau, in that room, belonging to the convent ; and it is impossible upon that circumstance to say, that according to his intention he had left them with her. From his residence he could not avoid leaving them there. This is fortified by what follows. Mrs. Johnson lived some time ; and he never left any paper with her ; or delivered any to her successor. Certainly at his death the abbess had no notion they were left with her ; for she desires the will to be brought to her ; and gets possession of it. In favour of an heir at law, whom I must see disinherited by nothing but a clear manifestation of intention, it would not be too strong to say, the testator did not mean his will to be consummate, unless he should do that act of leaving it with the Superior, which he never did.

But there is another ground : not whether the same envelope or superscription is evidence, that the testator meant, these should be the papers referred to ; but whether I must of necessity collect from the contents of the will, that they should be considered the same. The same cover is nothing with reference to the statute ; and the superscription has not three witnesses.

† Cowp. 130.

The true question is, if these papers were found in the bureau with the will, can I say from the contents of the will, these two papers are the papers referred to? Suppose, several other papers were found with them: could I say, this will would have enabled me to select these two as the only papers referred to? The rule and my opinion are, that the will has not by its contents sufficiently identified these papers to enable me to say, they are necessarily incorporated: if not, they are not attested by three witnesses; and it is admitted on *all hands, that this sort of disposition, unless the antecedent paper is incorporated, cannot be brought within the rule as to debts and legacies charged on real estate by an unattested paper. I cannot therefore give these parties their legacies; though I regret it.

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During the argument the LORD CHANCELLOR expressed his opinion, that the legacy of 100*l.* for such purposes as the Superior of the convent or her successor should judge most expedient, being given in that character, was sufficient to shew, it was for a superstitious use.

TROUGHTON *v.* BINKES.†

(6 Vesey, 573—576.)

1801.
Dec. 15, 17.
ELDON, L.C.

Creditors under a deed of trust cannot have a decree for redemption against a mortgagee; unless a special case; as collusion; that the trustee refuses, &c. In this case the bill by the creditors prayed, not a redemption but a sale; to which the mortgagee would not consent; but submitted to be redeemed; and the bill was dismissed.

[573]

THE bill was filed by four persons, claiming as creditors of Henry Evans Holder, on behalf of themselves and all other creditors, who shall come in and contribute to the expense of the suit, against the trustees under a general deed of trust for the *creditors, the Daniels, claiming under a prior mortgage, and being consignees of the estate in Barbadoes, Norton, a judgment creditor, Spragg, the assignee of Holder, and against Holder himself; who died before the hearing.

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The plaintiffs Kidd and Kennett were at the date of the trust deed creditors of Holder to the amount of 42*l.* for goods sold.

† *Nat. Bank, &c. v. United Hand in Hand, &c.* (1879) 4 App. Ca. 391, 400.

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Subsequent to the deed of trust Holder contracted another debt with them to the amount of 136*l.*; for which he executed a mortgage to them of the same estate in Barbadoes, with the stock for ninety-nine years, and warrants of attorney to confess judgment. By indentures, dated the 23rd of December, 1796, Kennett and Kidd assigned their debts and securities to the plaintiff Troughton. The fourth plaintiff Boxham was a creditor, as indorsee of a bill of exchange drawn by Holder, and dishonoured.

The bill prayed an account of the profits and produce of the plantation, &c. received by the Daniels, and of the application, and of what is due to them and to Norton on their securities; and that the premises may be sold; and that the money produced may be applied in the first place in payment of what shall be found due to the Daniels and Norton. The bill also prayed an account against the trustees, and an application according to the trusts of the deed for the benefit of the creditors.

The defendants, the Daniels, who claimed under their mortgage a debt of above 7,500*l.*, by their answer refused to consent to a sale; and they stated, that they are ready and willing on being paid the whole of what is due to them on their mortgage and their costs to convey, as the Court shall direct; but submit, the plaintiffs are not entitled to have the accounts prayed taken as against them, unless the plaintiffs will undertake to redeem said premises and to pay to the defendants the whole of what now remains due to them on said mortgage.

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Mr. Piggott, Mr. Romilly, and Mr. Jordan, for the defendants, the Daniels, insisted, that the plaintiffs had no right to redeem them, notwithstanding the submission in their answer; that the bill *did not seek a redemption; and the submission to do that, which the plaintiffs do not seek, cannot supply the want of proper allegations in the bill and the prayer of that relief; and that the plaintiffs ought to have amended the bill and to have shewn a right to redeem.

THE MASTER OF THE ROLLS :

Most of the relief sought by this bill is of course. But it prays

an account against the Daniels : and that the estate may be sold and the money applied in the first place in payment of what shall be due to them. It is admitted, there could be no sale ; the mortgagees not consenting to a sale. The plaintiffs are creditors under the trust deed. The trustees could come for a redemption : but I doubted, whether two or three creditors could come in their own names to redeem for their own benefit. It struck me as extraordinary, that they should file a bill to redeem for themselves, and so gain a preference ; for then they must be redeemed. But it is now admitted, that they cannot claim to redeem to that extent ; but if any creditors choose to come in and contribute, then all are to have the benefit. I should have thought, the trustees should have come, and have claimed the benefit for them ; not, that the creditors themselves should come in the first instance, and as a matter of course. For that a case must be made ; that the trustees were called upon to redeem ; and they refused. A case of that kind, *Franklyn v. Ferne*,† was stated, in which the general principle was recognized ; but it was decided, that the plaintiff had made a case. Lord Chief Baron PARKER stated the established principle, that he, who has the legal estate, must redeem ; unless a special case is made ; as, that trustees or executors are colluding ; or, if they are unsafe. I am therefore confirmed in my opinion, by the authority of that case as well as by analogy, that the Court cannot in this short way decree redemption. In *Utterson v. Mair*‡ it was alleged, that the executor was an insolvent person. The assignees demurred ; as the executor was the person to make the demand ; and the demurrer was allowed. The LORD CHANCELLOR was of opinion, that a case might be made : but that was not done. In this case I am of opinion, *that, though a ground is made for redemption, this bill is not framed for that relief.

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v.
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Dismiss the bill against the mortgagees.

† Barn. 30.

‡ 4 Br. C. C. 270.

K. B. HILARY TERM.

1800.
Jan. 23.

POLLARD AND ANOTHER v. BELL.

(8 T. R. 434—444.)

[434]

Where a policy of insurance has been made on goods on board a certain ship "warranted a Dane" (Denmark being a neutral country), the warranty is not falsified by a sentence of a foreign court of Admiralty condemning the ship for navigating contrary to the ordinances of the belligerent state, to which the neutral country (Denmark) had not assented.

[*435]

THIS was an action on a policy of insurance on goods on board the ship *Juliana*, "warranted a Dane," on a voyage at and from London to Teneriffe, with liberty to touch at Guernsey and Madeira. The defendant subscribed the policy as an underwriter for 200*l.* at a premium of four guineas per cent. The policy was effected by the plaintiffs, as agents, on account and for the benefit of certain persons resident in the island of Teneriffe, in whom it was averred that the interest was. There were counts in the declaration for a total loss by capture, and *for money paid, and for money had and received. The defendant pleaded the general issue, and paid the premium into Court; and at the trial a verdict was taken for the plaintiff, subject to the opinion of this Court, on the following case:—

The persons for whose benefit the policy was effected were, at the time of making it, and still are, resident in Teneriffe. The *Juliana* was a Danish ship, and the property of Danish subjects; and previous to the voyage insured, had a passport signed by the King of Denmark, for a voyage from Copenhagen to ports in the East Indies. Eggleston, the captain of the ship, sailed from Copenhagen on the 23rd of June, 1796, having on board a partial cargo of tar, pitch, cordage, cables, pump leather, French brandy, sail-cloth, and coals; and, in pursuance of the verbal instructions of the owners of the *Juliana*, arrived in the Thames on the 23rd of July, 1796. During his stay in the said river, he took on board a quantity of goods on account of the

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owners of the ship, and the goods on which the policy was written; and, having taken out his clearances for Guernsey and Madeira, on the 23rd of August, 1796, he sailed on the voyage insured. At Guernsey he took in additional goods on account of the ship-owners; and, proceeding from thence on the 27th of August, was captured on the 18th of September by a French privateer, *La Dorade*, and carried into Bordeaux. At the time of the capture, and during the whole voyage insured, the *Juliana* had on board the passport above mentioned, and every other document usually carried by Danish ships. She had also a *roll d'equipage*, containing the names and places of nativity of the officers, but not of the crew, only stating the latter generally to be sixty men of colour. Captain Eggleston, who was master of the ship for the voyage insured, was born in Scotland, of British parents, under the allegiance of the King. He was not naturalized in Denmark; but on the 6th of October, 1794, posterior to the war between England and France, he obtained letters of burghership in Denmark; but had no domicile there, never having resided there. Upon the ship's arrival at Bordeaux, proceedings were instituted by the captors before the tribunal of commerce, by which court the ship and cargo, with the exception of one bale of goods, were condemned as prize. From this sentence Captain Eggleston appealed to the civil tribunal of La Gironde, where there was a general sentence of condemnation. [These two sentences were set forth at large in the special case: but being *unusually long and complicated, introducing a variety of irrelevant matter and false reasoning, they are here omitted, as they could not fail of disgusting every person on whom the task of reading them should be imposed. It may be sufficient to state, that they recited several French ordinances, particularly one in 1778, by which it is declared, That all ships shall be confiscated "wherever there shall be found on board a supercargo, merchant, commissary, or chief officer, being an enemy; and that this Court were of opinion that it appeared on the sentences themselves, that this ship was ultimately condemned for a violation of that ordinance, the captain being a Scotchman.] From this sentence Captain Eggleston appealed to the supreme tribunal of cassation at Paris,

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which decreed as follows: "Having heard the parties, the tribunal, considering that it hath been fully proved by the confession of Captain Eggleston, and ascertained by the judges of La Gironde, that the said Captain Eggleston was born in Scotland, and an enemy; that his denization in a neutral country was not justified according to law; that his quality of enemy sufficed to legitimate the prize; that the fact of Captain Eggleston being a Scot and enemy, existed independently of the papers on board; that in consequence all remedies of nullity drawn either from the withdrawing of some of the papers on board, or from the non-application of the seal to the bag wherein they were inclosed, cannot give any ground to cassation,—rejects the request of Charles Eggleston, and condemns him to the fine of 150 francs."

This case was twice argued; the first time in Michaelmas Term last by *Park* for the plaintiff, and *Carr* for the defendant; and now by *Gibbs* for the former, and *Rous* for the latter; and judgment was now given for the plaintiff.

LORD KENYON, Ch. J. :

This is an action on a policy of insurance on goods on board a ship, warranted to be a Danish ship; a loss having happened, the defendant resists the plaintiff's claim, because (he says) that the ship in question was not what she was warranted to be, Danish; and I agree with the defendant, that the meaning of the warranty was not merely that the ship was Danish built, but that she should be circumstanced during the voyage as a Danish ship ought to be. This does not appear to me to be a case of difficulty, though it is of great importance to the public. This is one of the numberless questions that have arisen in consequence of the extraordinary sentences of condemnation *passed by the Courts of Admiralty in France during this war. I do not think that they were characterized too strongly at the bar, when it was stated that they all proceeded on a system of plunder; but still, until the legislature interferes on this subject, we, sitting in a court of law, are bound to give credit to the sentences of a court of competent jurisdiction. If, therefore, in this instance, the French courts had condemned this ship on the ground that it was

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not Danish property, we should have been concluded by that sentence in this action, and must (however reluctantly, it being stated as a fact, in the beginning of the case, that it was a Danish ship) have given judgment for the defendant. This is proved by the different cases cited in the argument, with the decisions in which I concur, and it is supported by reason. To a question asked in the course of the argument, What are the rules on which the Courts of Admiralty profess to proceed? I answer, The law of nations, and such treaties as particular states have agreed shall be engrafted on that law. It was said, however, by the defendant's counsel, that an *arrêt* has the same force as a treaty; but, without stopping to enlarge on the difference between them, it is sufficient to say, that the one is a contract made by the contracting parties,—and that the other is an *ex parte* ordinance, made by one nation only, to which no other state is a party; and I concur with Lord MANSFIELD in opinion, that it is not competent to one nation to add to the law of nations by its own arbitrary ordinances, without the concurrence of other nations. That is the ground on which this case must be decided. Now let us see what was the foundation of the condemnation in the French courts. It is stated in one of the sentences that, by their own ordinances, all ships are to be confiscated, “whosoever on board these ships shall be found a super-cargo, merchant, commissary, or chief officer, being an enemy:” but, I say, they had no right, by making such an ordinance, to bind other nations. Then, Was the ship in question condemned on the ground that she was not Danish property? Certainly not. A vast variety of circumstances, wholly irrelevant, are set forth in the sentences; but it appears clear, beyond all doubt, that the ship was at last condemned on the ground that the captain was one of those persons whom, by their own ordinances only, they wished to proscribe. This case cannot be distinguished from that of *Mayne v. Walter*; † though, even without the authority of that case, I should have had no *hesitation in deciding in favour of the plaintiff. On the whole, therefore, I am of opinion that though, if contrary to justice the ship had been condemned simply because she was not a Danish ship, we should have been

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† Park, Insur. 414.

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concluded by that sentence; yet, as the courts abroad have endeavoured to give other supports to their judgment which do not warrant it, and have stated, as the foundation of the sentence of condemnation, one of their own ordinances, which is not binding on other nations, this sentence does not prove that the ship in question was not a neutral ship; and, consequently, the plaintiff is entitled to recover.

GROSE, J.:

This is an action brought on a policy of insurance, to recover the amount of the loss stated in the declaration. The plaintiff proved his interest, and the loss; and *prima facie* proved that the ship was Danish. The defence to the action is, first, That though it is stated that the ship was Danish, she was in truth the property of an enemy, and therefore not neutral; and, secondly, That she had not the proper documents on board to prove that she was neutral. With regard to the first, it is not only not stated as a fact, nor to be collected by inference, that she was not a neutral ship, but it is expressly stated as a fact, in the former part of the case, that the ship was a Danish ship, and the property of Danish subjects. If this had been found as a fact on a special verdict, it would have been conclusive, and we could not have inferred the contrary from the sentence; but, referring to the sentence, it comes to this: That it there appears that the ship was a Danish ship, unless the circumstance of the captain's being born in Scotland is evidence to shew that it was not a Danish ship; but I find nothing to warrant that, either in our own law or in the law of nations. In the case of *Mayne v. Walter*, the Court of Admiralty in France condemned the ship, because she had an English supercargo on board, which was contrary to one of the French ordinances; but this Court did not consider that the circumstance of a neutral ship having on board an English supercargo was a breach of neutrality. So here, this ship having on board a captain a native of Scotland, is no proof that the ship in question was not neutral. As to the second question, if the ship had been condemned for not having the proper documents on board, we must have decided in favour of the defendant; but it appears by the case that, in point of

fact, she had "every document usually carried by Danish ships." I admit that, if the ship had been condemned generally as a lawful prize, our law would have considered that as a denial of her neutrality; *or, if the ground of the sentence of condemnation had been that the ship was not neutral, that also would have been conclusive in this action; but, by referring to the last sentence, which I consider as the sentence of a Court of *dernier resort*, it evidently appears that she was condemned because the captain was born in Scotland and an enemy; for that sentence runs thus: "Considering that it hath been fully proved by the confession of Captain Eggleston, and ascertained, &c. that the said Captain Eggleston was born in Scotland, and an enemy; that his denization in a neutral country was not justified according to law; that his quality of enemy sufficed to legitimate the prize; that the fact of Captain Eggleston's being a Scot and enemy, existed independently of the papers on board; that in consequence, all remedies, drawn either from the withdrawing of some of the papers on board, or from the non-application of the seal to the bag wherein they were included, cannot give any ground to cassation, &c. condemns," &c. I admit that that sentence, conclusively, proves that the captain was a Scot and an enemy; but it does not prove that the ship was not Danish, nor that she had not the proper documents on board for a Danish ship: we cannot, by the law of nations, say that, for the reason here given, the ship was not neutral. If it had been necessary to consider the two first sentences, and to have extracted the clear grounds of decision from them, I should have found myself under considerable difficulties. That they are not like each other is perfectly clear; for, in the first, the ship and cargo are condemned with an exception; but the second is a general sentence of condemnation, without any exception; but it is clear that the ship was ultimately condemned, because the captain was a Scot and an enemy;—and, in this view of considering the case, I do not think that, by determining in favour of the plaintiff, we shall shake the authority of any former decision. My opinion, then, on the whole is, that as the ground of the sentence of condemnation was an infringement of an ordinance of one state, it does not appear, by that sentence, that the ship was not, what the jury

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LAWRENCE, J.:

[*440] There are two questions in this case:—first, What is the ground of the sentence of condemnation? secondly, If the warrant of neutrality is thereby falsified? for if it be, according to all the authorities that is conclusive here. On the first question, the clear ground of condemnation was, that the *owner and master had acted contrary to French ordinances. The second sentence, after enumerating various causes contrary to their own ordinances, concludes thus: “Accordingly, by making reference to the provisions of the maritime laws and regulations, from which the decrees of the Executive Directory are merely the emanation; and to the facts proved by the papers of the proceedings, it is fully decided, that the ship *Juliana* and her cargo ought to be pronounced a legal capture, to be seized and confiscated for the benefit of the fitters out of the privateer the *Dorade*, as being found nearly to have incurred all the cases they have provided against,” that is, which those laws, and regulations, and decrees have provided against. From that sentence there was another appeal; and there the only ground of the sentence is, that the captain of the ship was born in Scotland, and an enemy; for they say, “That his quality of enemy sufficed to legitimate the prize.” But why? Because it is provided by one of their own ordinances, that if there shall be found on board any ship, whether neutral or the ship of an ally, any officer belonging to an enemy’s country, the ship shall be confiscated: that being the ground of the sentence of condemnation, the next question is, Whether that has negatived the warranty of neutrality? The warranty of neutrality does not induce any necessity to comply with the peculiar regulations of the belligerent powers; for if a ship be captured, and the question be, Whether she be neutral or not? the general rule for judging and deciding on that point is the law of nations, subject to such alterations and modifications as may have been introduced by treaties: but where the law of nations has not been varied or

departed from by mutual agreement, that is the general rule for deciding all questions on matter of prize. This is clearly laid down in the state paper signed by *Sir George Lee, Dr. Paul, the King's Advocate, and Sir D. Ryder, and Mr. Murray*, then Attorney and Solicitor-General, in answer to the Prussian memorial, concerning neutral ships.† When therefore a state in amity with a belligerent power has by treaty agreed that the ships of their subjects shall only have the character when furnished with certain precise documents, whoever warrants a ship as the property of such subject should provide himself with those evidences which have, by the country to which it belongs, been agreed to be the necessary proof of that character. In requiring this, no difficulty is imposed of which the assured is not aware, *and which may not be in his power to prevent: but to require of him to furnish himself with every document the belligerent powers may require, and to insist that the warranty is not complied with, unless the ship be navigated according to their ordinances and regulations, would be to deprive the assured of his indemnity for the want of papers, &c. of the necessity of which he may fairly be presumed ignorant, and which papers it may not be in his power to procure: for how can the officers of one country be called on to grant that which the laws of their own country do not require? These French decrees are regulations made with some view to the laws of France, but are not applicable to the subjects of any other country. In examining the cases decided on this point, it will not be found that there is any determination of the court to support what has been insisted on by the defendant: but, on the contrary, it has been settled in many cases, that a condemnation on the particular ordinances of a belligerent power, is no violation of a warranty of neutrality. In the case of *Bernardi v. Motteux*,‡ the ship *Joanna* was warranted neutral; the only doubt was, Whether the ship were condemned as being the property of an enemy, or for violating a French *arrêt*, by throwing papers overboard; for the one or the other of those causes she was condemned; if she were condemned for the first, namely, that she was not neutral, the plaintiff clearly could not have recovered; nor could he have

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† Vid. *Collectanea Juridica*, 1 vol. 33.

‡ Dougl. 575.

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recovered if she were condemned on the other ground, according to the argument of the defendant in this case; but it is clear that the Court did not in that case adopt the defendant's argument here, because the plaintiff did recover in that case, it not being certain that the ground of condemnation was, that the ship was the property of an enemy. But the case chiefly relied on by the defendant here is, that of *Barzillai v. Lewis*,† which was decided on the ground of a non-compliance with the treaty of Utrecht, and on the sentence having condemned the ship as English. According to a manuscript note of that case, taken by Mr. J. BULLER rather more full than that in print, Lord MANSFIELD began his judgment by stating the sentence of the Court of Admiralty as being conclusive, and that the question was on the meaning of it. He afterwards observed that the ship was insured by her Dutch name, and that the underwriters took it for granted that she was so; but that when this was sifted in France, she appeared to have none of the requisites to shew that she was neutral property, for that she had never *been in a Dutch port, and that the sea brief was not conformable to the treaty of Utrecht; and he concluded by saying, that the ship was condemned as an English ship, and that it was not open to this Court to inquire whether that sentence were right or wrong. So here, if the ship had been condemned as an English and not a Danish ship, we should have been concluded by it. In that case, Mr. J. WILLIS and Mr. J. ASHHURST concurred; and Mr. J. BULLER said, "The first sentence seems to have been on particular *arrêts*. The second appears to go on the ground of property, for the name is changed; and they do not go into evidence as to the muster-roll or situation of the crew, as to there being more than two-thirds English. The other ground is more general, and makes it immaterial whether it was on the one ground or the other; 'for if she were not so documented as to have the protection of a neutral ship,' the warranty is not complied with." It is true that Lord MANSFIELD, in the course of giving his opinion in that case, used some expressions which may be applied to support the defendant's argument here; but it is clear that the ground on which he decided, was a non-compliance

† Park, Insur. 410.

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with what was agreed by the treaty of Utrecht should be a necessary document to prove the ship to be Dutch property; and this was the express ground of the opinions of the other judges. That Lord MANSFIELD could not in that case intend to say that a non-compliance with the ordinances of France, not adopted by any treaty, was a forfeiture of neutrality, appears from the case of *Mayne v. Walter*,† where the plaintiff recovered; he there pointedly shewed how such ordinances might become binding, by observing that the whole case turned upon the treaties between France and Portugal, about which both parties were silent; and there it was holden that the circumstance of having an English supercargo on board, was no ground to defeat the plaintiff's right to recover on a policy on a ship warranted to be Portuguese. In a subsequent case, *Saloucci v. Johnson*,‡ there were two grounds of condemnation; one that the ship would not stop to be searched; the other, that she had not a charter party on board, as required by an ordinance of Spain; on the latter, Mr. J. ASHHURST said (according to his own note) "As to the next question, her not having a charter party, this clearly is not required by the law of nations; and it appears by the case that she was a general ship; and though she acted contrary to a particular ordinance of Spain, *other nations are not bound to take notice of such ordinance, unless in virtue of some treaty subsisting between two states, by which they submit to be bound by such ordinance: 'that is not the case here.'" So that the doctrine on which the case before us is determined, was distinctly recognised there. The argument of the defendant here is, That the sentence of condemnation is conclusive on the point that the ship was not navigated according to the contract between the parties; the contract between the parties is, That she was a neutral ship: but the sentence has not decided that point; it has only decided that she was not navigated according to the ordinances of France; but that was no part of the plaintiff's contract. In deciding this case in favour of the plaintiff, we do not take upon ourselves to say that the sentence of the French Court of Admiralty is erroneous: all that we determine is, that the French court has not decided that which would be a breach of the

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† Park, Insur. 414.

‡ Park, Insur. 415.

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LE BLANC, J. :

This case has been already so fully gone into by the Bench, that little remains for me to say ; I shall therefore content myself with expressing my concurrence in the opinion given by the Court, and shortly stating the grounds on which I have formed that opinion. On examining the sentences in the different courts of France, we cannot collect that the ship was ultimately condemned because she was not a Danish ship. As the grounds of condemnation are stated in the sentences themselves, unless we can collect that the ship was condemned as prize because she was not a Danish ship, those sentences are not conclusive on this question between the litigating parties. The question in this case is, Whether or not the ship was Danish ? In looking through these sentences of condemnation, I do not find that she was condemned as not being Danish, or for not having those documents that the law of nations or particular treaties between the respective countries require to evidence her to be a Danish or a neutral ship. The sentences in France, whether right or wrong, are conclusive on the question of prize ; and therefore if the question here had been, Whether or not the ship had been captured as prize ? those sentences would have been conclusive : but that is not the question here ; the only question here being, Whether or not this were a neutral ship at the time of the capture ? I admit, that in order to comply with the *warranty of neutrality, it was necessary not only that the ship should be a neutral ship, but also that she should be properly documented, and should be navigated in such a manner as to be entitled to the benefits of neutral ships. But here the ship was condemned for non-compliance with the ordinances of one belligerent power, to which it does not appear that Denmark ever consented. Then the question is, Whether a sentence, appearing on the face of it to have been given on that ground, ought to preclude the plaintiff from shewing that in point of fac

the ship was a Danish ship? As it does not appear in the sentence that the ship was condemned as not being a Danish ship, I think it is competent to the parties to go into proof of that fact. Without repeating the authorities that have been referred to in support of our opinion, I think that the conclusion from them all is this: That the sentence of a foreign court is conclusive on that point that it professes to decide; if it be a general sentence of condemnation, without assigning any reason, the courts here will consider that it proceeded on the ground of the ship's being the property of an enemy; but if the sentence itself profess to be made on particular grounds, and they are set forth in the sentence, and appear not to warrant the condemnation, then the sentence is not conclusive as to those facts. Therefore as the sentences of condemnation in this case profess to be made on an ordinance of France, to which Denmark is no party, they do not falsify the warranty of neutrality as between the parties to this cause, though they may justify the courts abroad in condemning the ship as prize. If the question here had been, Whether or not the ship had been prize? the sentences abroad would have been conclusive; but the question here being only, Whether or not the ship were neutral? those sentences are not conclusive on that point.†

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Postea to the plaintiff.

A similar case, *Helstrom v. Rhodes*, standing in the paper at the same time, received a similar decision without argument. Wigley, who was to have argued this case, mentioned that of *De Souza v. Ewer*, Guildhall Sittings after Hil. 1789, (Park, Insur. 361, 4th edit.), as a direct authority for the defendant; but Lord KENYON said that that case came before him at Guildhall very soon after he came on the bench, when he was not so conversant in questions of this kind as he was now; that he was satisfied he was mistaken in that decision; and consequently that it could no longer be considered as any authority.‡

† Compare, upon the effect of a judgment *in rem* upon the matter in point, *Castrique v. Imrie* (H. L. 1870) L. R. 4 H. L. 414, 39 L. J. C. P. 350, 23 L. T. 48—R. C.

‡ In another case, *Bird v. Appleton* reported in the same volume (8 T. R. 562, p. 468, *post*), the Court followed their own judgment, pronounced in the above case of *Pollard v. Bell*.—R. C.

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BURGH AND OTHERS, ASSIGNEES OF R. WHEELER,
A BANKRUPT, v. PRESTON.

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(8 T. R. 483—486.)

A bond was conditioned that the obligor should indemnify the obligee from all the sums the latter should pay, or be liable to pay, on the obligor's account; and before the execution of the bond a memorandum was thereon indorsed, that the obligee "hath given an undertaking not to sue upon the bond until after the obligor's death;" held that this memorandum was to be taken as part of the condition; and made the bond in effect payable only by the representatives of the obligor after his death.

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THIS was an action of debt on two bonds given by the defendant to the bankrupt; the one dated the 8th of January, 1790, in the penal sum of 10,000*l.*; the other dated September 16th, 1791, in the sum of 20,000*l.* The defendant craved *oyer* *of the condition of the first bond, "and memorandum annexed and subscribed to the said writing obligatory." The condition was, that the defendant should pay to Wheeler all such sums as Wheeler had advanced or paid for or on account, or was liable to pay for or on account of the defendant, or should at any time thereafter pay or be liable to pay for or on account of the defendant, by reason or means of the defendant having drawn, or thereafter drawing any bill of exchange upon Wheeler, &c. The memorandum was this: "The before-named R. Wheeler hath given an undertaking not to bring any action or suit upon the before-written bond, or assign the same until after the death of the said R. Preston." The defendant then craved *oyer* of the condition of the second bond and memorandum, which were of the same kind; and then pleaded, that the memorandum to the first bond was written, annexed, and subscribed to the bond before the sealing and delivery thereof by him the said defendant; and that the defendant is still living: he also pleaded in the same way respecting the other memorandum, &c. To this plea there was a general demurrer, and joinder in demurrer.

Giles, in support of the demurrer,† admitted, that if the

† This case was argued on a prior day in this Term.

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memorandum, written before the execution of the bond, were intended by the parties to be taken as part of the condition of it, the case of *Broke v. Smith* † was decisive that it might be pleaded as such, notwithstanding what is said in Bro. Abr. tit. “Faites,” pl. 72; & 2 Rol. Abr. “Faites,” G. pl. 8. But he contended that this memorandum was not intended to make part of the deed. It is merely a memorandum of something which had before that time been agreed upon; but it is not the agreement itself. The words are, that Wheeler “hath given an undertaking;” clearly referring to some other prior agreement. The agreement itself should have been set forth, in order that the Court might put a legal construction upon it, as connected with the condition of the bond: it does not, therefore, even amount to a covenant not to sue. But taking it to be in effect a covenant not to sue, it cannot be pleaded as a release in bar of the action; but the breach of it is a substantive ground of action in itself. It is true that a covenant by an obligee not to sue his obligor at all will enure as a release, and may be pleaded in bar of an action on the bond, in order to avoid a circuitry of action; as was agreed in *Smith v. Mapleback*, ‡ and *Dean v. Newhall*. § But that only holds *good where the covenant not to sue is co-extensive with the right of suing, and not where such covenant not to sue is only for a limited time, as in *Ayliffe v. Scrimshire*. || Now this is an agreement of that kind; for at most it is only an undertaking not to sue upon or assign the bond during Preston’s life. But even taking the memorandum to be part of the condition, this action, which is brought by the assignees and not by the bankrupt himself, is no breach of it; for it is only a personal contract, and he has no control over the assignees. Bro. Abr. tit. “Conscience,” pl. 1. And here too the condition was not broken until after the bankruptcy. (Lord KENYON, Ch. J. said it was clear that the assignees must take the bankrupt’s property, subject to all his legal contracts and equities.)

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Dickens, for the defendant:

The memorandum must be taken to be part of the condition,

† Moor, 679.

§ 8 T. R. 168.

‡ 1 R. B. 247, 1 T. R. 446.

|| 1 Show, 46.

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and incorporated into it. This was decided in *Broke v. Smith*; † and must have been taken for granted in *Steadman v. Purchase*; ‡ otherwise no notice could have been taken of the memorandum as a separate instrument for want of a stamp, and because it was not signed by the parties. As to the words “hath given,” &c. those are common words of grant in all conveyances, and are not taken in a retrospective sense. The effect of the memorandum is not to destroy the condition of the bond as first expressed, but to explain it. It is only a stipulation not to take advantage of it during the lifetime of the obligee. It operates, however, as a release during that period, according to the doctrine in *Lacy v. Kinaston*, § and may consequently be pleaded in bar.

Giles, in reply, said that the memorandum was repugnant to the condition before expressed in the bond; that the two could not stand together; and that the defendant himself had pleaded it as a separate instrument.

Cur. adv. vult.

LORD KENYON, Ch. J. now delivered the opinion of the Court :

After stating the case, his Lordship proceeded thus:—The question is, What is the effect of this memorandum? and we are of opinion, that it was the intention of the parties that this should be taken as part of the condition of the bond. It is like the common case of a condition annexed to an obligation to postpone the payment for a certain time; the bond is given for a certain sum, but with a condition that, if before such a *day the obligor pay such a sum, either by instalments or as a gross sum, then the bond shall be void. In this case the question is only, What was the intention of these parties? and it appears to us that they intended that the obligor should not be called upon to pay this money during his lifetime, but that the payment should be deferred until after his death, and then be made by his executors; and there is nothing illegal in such a contract. If this had been a covenant not to sue at all, it would have operated as a release; and the debt, once released, would have been gone for ever. This is not like some of the cases in the books, where

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† Moor. 679.

‡ 6 T. R. 737.

§ 1 Ld. Ray. 690.

there was a collateral agreement (in a different deed) not to sue, in which the courts have said that the party must resort to his agreement and cannot plead it as a release; for here the memorandum was annexed to, and was subscribed before the execution of the bond; and our decision is fully warranted by the case cited from Moor. 679: there the question was, Whether or not a memorandum indorsed on a bond before the execution of it, should be considered as explanatory of the intention of the parties respecting the operation of the condition? POPHAM, J. was clearly of opinion that it should, it being a contemporary act; and though some of the Judges at first doubted of this, they afterwards agreed in opinion with POPHAM. In this case therefore we are of opinion that the parties intended that it should not be in the power of the obligee to enforce payment of the bond from the obligor during the lifetime of the latter, but that payment should be made by the executors of the obligor afterwards; and consequently the defendant is entitled to the judgment of the Court.

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Judgment for the defendant.

BLAKE v. FOSTER.

(8 T. R. 487—496.)

1800.

Feb. 11

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To an action by a lessor for a breach of covenant on an indenture of lease in not repairing, &c. the lessee cannot plead in bar that the lessor had only an equitable estate in the premises; for that is tantamount to a plea of *nil habuit in tenementis*. But the lessee is not estopped from shewing that the lessor was only seised in right of his wife for her life, and that she died before the covenant broken, because an interest passed by the lease.

THIS was an action of covenant on an indenture, dated May 16th, 1778, by which Blake and Sarah his wife demised certain tenements to the defendant for twenty-one years from Lady-Day then last, and in which the defendant covenanted to repair, &c. The breach assigned was, not repairing. The defendant (besides pleading *non est factum*, and that he did repair, &c. on which issues were taken) pleaded, thirdly, That before the making of the indenture, to wit, on the 28rd of June, 1768, T. Woodward being seised in fee of the demised premises, by will devised the

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same to C. Knowles and R. Trowbridge, and their heirs for ever, to the use of them and their heirs, upon certain trusts therein particularly mentioned, and, amongst others, upon trust, that they and the survivor of them, and the heirs of such survivor, should from time to time, during the life of the said Sarah, the wife of the said Henry, pay the rents, issues, and profits thereof (subject as therein mentioned) to the said Sarah and her assigns, or otherwise permit and suffer her *and them to receive and take the same to and for her and their own use and benefit, and after her decease upon certain other trusts therein particularly mentioned; by virtue of which devise Knowles and Trowbridge, after the decease of Woodward and before the making of the indenture, to wit, on, &c. entered, &c. and became and were seised thereof, upon the trusts in the said will mentioned; whereupon the plaintiff and Sarah his wife, in right of the wife, became and were entitled to the rents, issues, and profits of the said premises under and by virtue of the said devise; and being so entitled, they the plaintiff and Sarah his wife, in right of the wife, made the said indenture; that after the making of the indenture, and before the expiration of the term, to wit, on the 1st of January, 1790, Sarah, the plaintiff's wife, died; whereupon the indenture and the term thereby created, and the said estate and interest of the plaintiff in the demised premises ceased and became, and were wholly void, ended, and determined; averring that the demised messuages, &c. did not become nor were ruinous, &c. at any time during the life of Sarah, the plaintiff's wife. The defendant in another plea, pleaded, That before and at the time of making the indenture, the plaintiff and his wife, in right of his wife, were seised in their demesne as of freehold, to wit, for and during the life of the said Sarah, of and in the demised premises; that after the making of the indenture, and before the expiration of the term, to wit, on the 1st of January, 1790, Sarah (the plaintiff's wife) died, whereupon the indenture and the term thereby created, and the estate and interest of the plaintiff of and in the demised premises, ceased and became and were wholly void, ended, and determined.

To the third plea, the plaintiff demurred, and assigned for causes of demurrer, that it is not admitted by the said plea that

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either the husband or wife had any estate in the demised premises, at or after the making of the said indenture, nor that any estate or interest passed either from the husband or the wife by the said indenture; that it is not alleged by that plea that the husband had not any estate of his own in the demised premises, at or after the making of the demise. He also demurred specially to the fourth plea for these causes, that it is not alleged or shewn by that plea how or in what manner the husband and wife, in right of the wife, became entitled to the demised premises for the life of the wife, nor how their title commenced; that the defendant by this plea attempted to plead a particular estate or title, without shewing the commencement of *it; and that the defendant has not by this plea alleged or shewn that the husband had not any estate of his own in the demised premises, at or after the making of the demise, nor admitted nor denied that any estate or interest passed from the husband by the said indenture.

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Abbott in support of the demurrer :

The defendant, by his third and fourth pleas, contends, That though he has enjoyed the premises demised to him by the plaintiff during the whole term, yet he is not bound to keep them in repair, because the lessor, whose title he controverts, had no authority to lease them, and cannot now enforce the covenant. The general rule is clear, That a tenant holding by indenture is estopped to plead to an action on his covenant, that his landlord *nil habuit in tenementis*. Now, the first special plea amounts in substance to the same thing; for the bar therein insisted on is, that the lessors had only an equitable interest in the premises, and consequently no power to lease. * * It will be argued, That by the last of the special pleas, it is admitted that an interest passed; and so there could be no estoppel. Such a distinction is indeed mentioned in Co. Lit. 45, a; but no reasons are stated for it; and, on the contrary, it is said in other books, that no good reason can be given for it. The same doctrine is alluded to in 1 Vent. 358; where it is said, That if a lessee for ten years make a lease for twenty years, and afterwards purchase the reversion, it is good for ten years; but shall not bind

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him for the residue, because he had no more interest in him at the time than for the ten years. But Bac. Abr. 192, referring to this case, adds a *quere*, because the reason does not seem satisfactory: and in the case in *Ventris*, *PEMBERTON*, Ch. J. said, That the difference was where *the party making the estate has a legal estate, and where a defeasible estate only: for, in the latter, a lease may work by estoppel, though an interest passed, so long as the estate out of which the lease was derived remained undefeated. Now here the entry of the heir was necessary, in order to defeat the lease. What is said in Co. Lit. 45, a, was probably taken from the case in *Moor*. 20, as said by three Judges: but the report in Dal. 26, is more full; and there it is stated, That if a lessee for life lease for years, and afterwards purchase the reversion, and die within the term, the heir in reversion may confess and avoid the lease; but it does not follow from thence that the lessee might; and besides, it was not an adjudged case, for it is put under a *nota*. At all events, however, an estate which a man has *jure uxoris*, is very different from an estate in his own right *pour autre vie*; for the former derives its force from her estate, and his controlling power over it; and he has no more interest in the estate than a stranger. It is the lease of the wife alone, and therefore operates against the husband by estoppel only; and consequently against the lessee in equal degree. * *

[After hearing *Jervis contra*, and *Abbott* in reply, the Court took time to consider.†]

[495] GROSE, J. now delivered the opinion of the Court:

This is an action of covenant, in which the plaintiff declares on a breach of covenant, contained in a lease of premises for twenty-one years, made by himself and his wife, in the lifetime of the wife, under which the defendant has occupied during the whole term. The breach assigned is, That the defendant has not, pursuant to the covenant, repaired the premises which were, during the term, ruinous and out of repair, and were so at the expiration of it. To this the defendant has pleaded several

† Lord Kenyon, Ch. J. was absent, through indisposition, on the day when this case was argued.

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pleas, the two first of which conclude to the country; and the question here arises on the third and fourth pleas, to which there are demurrers. The third plea states that, before the date of the lease, Thomas Woodward, being seised in fee of the premises, devised them to trustees and their heirs, to the use of them and their heirs, in trust that they should from time to time, during the life of the wife, pay the rents to her, or permit her to receive them, to her own use and benefit;—that thereupon the husband and wife, in right of the wife, became entitled to the rents; and, being so entitled, made the indenture: that, before the expiration of the lease, the wife died, whereupon the said term ceased and ended; and that the premises were not out of repair during the lifetime of the wife. The causes of demurrer assigned to this plea are, that it does not *admit that the plaintiff or his wife had any estate in the premises at the time of the making of the indenture, or that any thing passed from either of them by that indenture. The fourth plea varies from the third, and states, That the husband and wife, in right of the wife, was seised in their demesne as of freehold for her life, with the like conclusion to this plea as to the third. The cause of demurrer shewn to this plea is, That the defendant has alleged a life estate in the wife, without shewing the commencement of it;—and this was the principal question we wished to look into. The general ground of demurrer on which the plaintiff proceeds as to both these pleas is, that the plaintiff is estopped by the indenture from so pleading, according to the rule in Co. Lit. 47, b; to which it is answered by the defendant, That according to the authority of the same book, where an interest passes, which is determined, there is no estoppel. The latter rule the counsel for the plaintiff has endeavoured to impeach. If this case stood on the third plea only, it could not be necessary to consider that question, which can only arise where it shall appear that some legal interest passed by the indenture; but, according to the facts disclosed by the third plea, the whole fee, both the possession and use, passed by the will of Thomas Woodward to the trustees, who were to receive and pay the rents and profits to the wife, it being the testator's object to create a trust which should place the estate out of the control and disposition of the

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husband ;—and were it to be holden, as has been argued, that by virtue of the statute of the 1 Ric. III. c. 1, the plaintiff could dispose of any legal interest in the estate so devised, it would in a great measure destroy that system of trusts by which real property is secured to women during their coverture, free from the control of their husbands. The cases which were cited in support of this position were cases of uses, which would be executed by the statute 27 H. VIII. and do not apply to a trust such as that created in favour of the plaintiff's wife. We are therefore of opinion that this third plea is no bar to the action.

Abbott then, finding that the Court were disposed to give judgment against the plaintiff on the fourth †plea, asked leave to amend, by striking out the demurrer to that plea, and replying specially : whereupon

The Court gave leave to amend accordingly.

K. B. EASTER TERM.

1800.
May 3.

THE KING v. HARRISON AND COMPANY. (8 T. R. 508.)

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A conviction on the excise laws against such an one and company cannot be supported.

A CONVICTION on the excise laws, under the above title, and against persons so described, was set down for argument in the peremptory paper ; but when it was called on,

LORD KENYON, Ch. J. said :

It is impossible that a conviction of such an one and company can be supported. It is a mere nullity even against the party named. The Court are bound in duty to take care that summary proceedings before magistrates are regularly conducted,

† The Court were prepared to overrule the formal as well as the substantial objections to this plea.

whether the parties object to them or not. We cannot tell upon the face of this proceeding but that the delinquency of Harrison's partners, who are not before the Court, may have been imputed to him. As no action could be maintained against such an one and company, without naming all the parties, so neither can a conviction be sustained in this form.

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HARRISON.

Per CURIAM :

Conviction quashed.†

Wood was to have argued in support of the conviction, and *Holroyd* against it.

JACKSON AND ANOTHER v. CHARNOCK.

(8 T. R. 509—515.)

1800.
May 6.

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If A. let his ship to B. for a voyage, engaging to keep it in repair during the whole time, for which he is to receive freight on the return of the ship; and for the safety of the ship it becomes necessary during the voyage to put into a port to refit; the expense of refitting must be borne entirely by A.; and B. is not liable to contribute to it in proportion to his interest in the cargo, as for a general average.

THIS was an action of covenant on a charter-party of affreightment of the *Britannia*, on a voyage from London to Madras, and from thence to any port or ports in the East Indies, and back again to the port of London. The action was brought for 8,297*l.* 12*s.* for freight, and for 1,440*l.* for demurrage; and the defendant having pleaded, the cause was tried at the sittings after last Michaelmas Term, at Guildhall, before Lord KENYON, when the jury, by consent, found a verdict for the plaintiff, damages 15,000*l.* subject to the arbitration of three merchants as to the *quantum*, and the opinion of this Court as to a question of law, on the following case :

The plaintiff, Jackson, was owner of the *Britannia* in 1796; and the other plaintiff Stewart, was captain of the same. On the 19th November, 1796, Jackson let to hire the ship for a voyage from London to India and back again, to the defendant,

† Having regard to Ord. LXVIII. case is still an authority in regard to of B. S. C. it would appear that this criminal proceedings.—B. C.

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who had contracted to furnish to the East India Company extra ships for their trade. The ship arrived safely at Bengal. On the 10th of December, 1797, after being surveyed by the East India Company's officers, and reported sea-worthy, she left Bengal laden with goods by the East India Company, to whom the ship was let by the defendant. On the 22nd of the same month, it was discovered that she had sprung a leak, and which leak gained upon the ship, notwithstanding every effort of the crew to keep it under. A consultation was holden by the officers of the ship, who were unanimously of opinion, that it was necessary for the common safety, that the ship should be lightened, as soon as possible, of spare materials and part of the cargo, which were thereupon thrown overboard; and in consequence of the ship being thus lightened, she arrived in Table Bay, at the Cape of Good Hope, on the 16th of February, 1797. Immediately on her arrival at the Cape, the ship, with the concurrence and approbation of the agents for all parties, was surveyed, and on that survey it was found that she could not proceed to England without being repaired; and that she could not be repaired without having her cargo taken out. A ship called the *Bombay Castle* was therefore hired, on board of which the cargo was placed; and the *Britannia* was thereupon repaired. The amount of the repairs, and other necessary and incidental charges connected with the repairs, together with the expenses of maintaining the crew, amounted to 4,395*l.* 4*s.* 6*d.* As soon as possible the cargo was reshipped, and the ship proceeded *with the utmost despatch to Saint Helena, in her way to England; and after being captured and recaptured in the course of her voyage from thence to England, she arrived safely at the port of London on the 5th of October, 1798, and there landed and delivered what remained of her cargo into the Company's warehouses. "The question for the opinion of the Court arises solely on the construction of the charter-party,† and *is, Whether

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† A copy of the charter-party was annexed to the case. The following articles were those referred to in the argument: Art. 2. "The said owner and master engage and agree that the said ship is of the burden of 384

tons at the least, and that she shall forthwith be equipped and stored in all things fit for such voyage, and to the satisfaction of the said R. Charnock; and both at her departure outwards and homewards, and also

or not the defendant be only liable to such general average as arises on the goods thrown overboard, or also to general average on the repairs and other expenses at the Cape of Good Hope?

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during the whole of the said voyage, shall have a proper and sufficient quantity of ballast on board to navigate her with the utmost safety; and a sufficient quantity of dunnage to be provided at the owner's expense, to preserve the cargo from damage; and shall be kept strong, tight, and well and sufficiently victualled, tackled, and appparelled, and completely furnished with all proper and necessary stores, and shall be manned," &c. Art. 5th. "Upon the said ship's having completed her outward voyage, and the discharge of her cargo, and having arrived at her loading port in India, the said R. Charnock, or his assigns, shall forthwith survey or cause the ship to be surveyed, and such repairs, fittings, and things as shall on such survey be deemed necessary or proper for a homeward voyage with a cargo of East India or other goods shall be forthwith done, supplied, and furnished at the owner's expense; and so soon as the said ship shall be put in fit and proper condition for such homeward voyage, then the said R. Charnock or his assigns, or his or their agents or servants, shall forthwith load, &c. &c. but no demurrage shall in any case grow due, nor shall any lay day be reckoned during such time as the ship is out of repair." Art. 6th. "The quantity of goods which the ship can take on board and bring home, &c. and the condition of the ship as to tackle, stores, and repairs, shall be determined by the person or persons appointed by the E. I. Company for such like purposes, whose opinions shall be binding and conclusive between the said parties. And the certificate of such person or persons,

or an authentic copy thereof, shall be deemed and taken as full evidence of such opinion." Art. 7th. "The ship, as soon as she shall have received her homeward lading and despatches, and not before, shall depart and set sail (wind and weather permitting) and shall return directly without any deviation, unavoidable dangers of the seas excepted, to the port of London, &c. and upon such discharge being completed, the said ship shall finish her intended voyage." Art. 10th. "The said R. Charnock and his assigns, his and their agents and servants both in England and abroad, shall have free liberty at all times during the said ship's whole intended voyage, and until her final unlading and discharge, to repair and maintain, or send one person on board; and for that purpose the ship, upon proper usual or known signals being made to her, shall lay to, if sailing, and wait till such person or persons come on board; and the said master shall civilly treat and entertain them with reasonable and convenient food and lodging during their stay at the owner's expense; and such person or persons shall and may take a survey of the ship and every part thereof, and of her cargo, ammunition, furniture, provisions, and stores, &c.; and if the said ship shall not be sufficiently victualled, manned, and armed, or if anything shall be deficient, wanting, or amiss, the said owner or master shall from time to time, upon reasonable notice given to such person or persons, cause the same to be amended and supplied according to the direction of such person as aforesaid. And if upon such survey it shall be found that

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Reynolds for the plaintiff:

The defendant is liable to general average for the whole expenses. It may be collected from all the writers on this subject, that by a general average is meant a contribution to the expenses that are necessarily incurred for the preservation of the ship and cargo, in consequence of losses and damages accidentally happening at sea, 1 Mag. Insur. p. 64.; which (among others) includes all that

there is a greater quantity of goods in the said ship than she can reasonably carry in her, so as to be free and fit to sail through the seas, and capable to defend herself, and let all her guns be clear, in such cases it shall be lawful for such person or persons to cause the ship to be lightened, so as to reduce the cargo to such a degree as that the ship can reasonably carry the same in manner aforesaid." Art. 18th. "If any of the goods or merchandizes laden or put on board the said ship shall be lost or not delivered, or shall be prejudiced, wet, or damaged, and if the owners shall not be able to prove to the satisfaction of the said R. Charnock *or his assigns that the said goods have been lost, prejudiced, wet, or damaged through unavoidable accident and necessity, then it shall be deemed that the said goods have been lost or damaged through the default of the master; and in such case the owners shall pay to the said R. Charnock or his assigns, the full prime cost of such goods lost or not delivered, and an addition of 30 per cent. thereon; and if the said R. Charnock or his assigns shall agree to receive the damaged goods, then the owners shall make good such damage as any of the said goods may have received, and lose the freight thereof; and if the said R. Charnock or his assigns, shall refuse to receive such damaged goods, then the owners shall take the same to their own use, and pay to the said R.

Charnock or his assigns, the full invoice price thereof, and all charges, customs, and duties in respect thereof, and 30 per cent. upon such price, charges, customs, and duties, besides losing the freight of the said goods; but if the owners shall be able to prove to the satisfaction of the said R. Charnock or his assigns, that the said goods have been lost or damaged through unavoidable accident and necessity, then and in such case they shall suffer no loss, except the freight and their proportion of a general average, in respect of any goods that may necessarily perish or be cast overboard for preservation of ship or cargo; nor shall the owners in any case be chargeable with any sum of money in respect of loss or damage exceeding the amount of 5*l.* a ton, on the ship's registered burden; and all payments in respect of loss or damages on the outward cargo shall be made in London and not in India, and that notwithstanding the said ship should happen to be lost or never arrive at London." Art. 22nd. "If the ship shall happen to be lost before her discharge and the final delivery of her homeward cargo, the said R. Charnock or his assigns shall not be liable to pay any freight or demurrage for the ship or her cargo, but it shall and may be lawful to and for the owners notwithstanding, to retain the said imprest-money for their own use."

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is thrown overboard or damaged by a jettison for the ship's safety, and charges occasioned by any unavoidable accidents. Now this case comes within that definition. The damage was accidental, and the expenses were necessary for the preservation of the whole concern; and then it becomes a general average. In *Da Costa v. Newnham*,† it was holden that when a ship is obliged to put into port for the benefit of the whole concern, the charges of loading and unloading the cargo and taking care of it, and even the wages and provisions of the workmen hired for the repairs, become general average; and in that case a passage was cited from Beawes's *Lex Mercatoria*, *to shew that when a ship is forced by a storm to enter a port to repair the damage she has sustained, if she cannot continue her voyage without an apparent risk of being lost, the wages and victuals of the crew are brought into an average, with all the charges of loading, unloading, anchorage, pilotage, and every other expense incurred by the necessity. Then on whom is this general contribution to be levied? Justice and law require that the expenses should be borne by all who are benefited by that which removes the danger, in proportion of their respective interests; by the owners of the ship, of the freight, and of the cargo. Here the defendant is interested in the cargo, and therefore is liable in proportion to his interest. It is no answer on the part of the defendant to say, that by the eighteenth article of the charter-party he is made expressly liable to a general average in one instance, as furnishing a presumptive argument that he is not liable in any other; because the defendant, being liable to general average both on principle and authority, should have introduced in the charter-party an exemption from the general average in this instance, if he had intended to be exempted. In *Hotham v. The East India Company*,‡ Lord MANSFIELD said, The owners were not to pay for the damage occasioned by the storm, the act of God: but this is an attempt to make them liable, and to turn them into insurers as well as owners. If the defendant be not liable to contribute on account of the cargo, the whole expense will fall on the plaintiff, who will not be able to recover it from the underwriters, not being interested in the cargo.

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et
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† 2 T. R. 407.

‡ Dougl. 278.

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Rous, for the defendant :

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If it were material to the interest of the defendant, it might be contended that the facts here stated do not bring this case within the principle relied upon by the plaintiff's counsel ; for it does not appear that the damage to the ship was occasioned by a storm. But it is not necessary now to consider what is the common rule respecting general average, since this case must depend on the particular contract between these parties ; by referring to which it will appear that the defendant is not liable to general average. This is not a general charter-party of affreightment, where the interest of several persons are trusted to one ; but it is a contract by which one person let the ship to another for a certain price, to be paid on certain events, and by the terms of which every kind of repair is to be made by the owner. By the second article, the owners *engaged that the ship should be "in all things fit for the voyage, both at her departure outwards and homewards, and also during the whole of the voyage," &c. By the fifth, the defendant was to have the ship surveyed in India previous to her return ; and the repairs proper for the homeward voyage were to be done "at the owners' expense ;" and, by the 22nd Article, the defendant was not to pay freight until the final delivery of the homeward cargo, even though the ship were lost. From every part of the contract it may be collected, That it was the intention of these parties that no freight was to be paid, unless the ship returned in safety ; and that all expenses of repairs were to be borne by the owners. The only exception is that mentioned in the 18th Article, by which it is provided, That in the event of the goods being lost or damaged by unavoidable accident and necessity, "the owners should suffer no loss, except the freight and their proportion of a general average, in respect of any goods that might necessarily perish, or be cast overboard for the preservation of the ship or cargo ;"—but it appears that these expenses were incurred in order to enable the plaintiffs to perform their part of the contract, without which they would not have been entitled to anything ; and therefore there is no ground for their calling on the defendant to contribute any proportion towards the repairs and other expenses at the Cape of Good Hope.

Reynolds in reply :

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Although it is not expressly found as a fact that this damage was occasioned by a storm, it evidently appears that it was by an unavoidable accident, which brings the case within the rule of general average. According to the defendant's argument, no question respecting general average would ever arise. The contracting parties usually provide for ordinary cases, as in this instance ; but such contracts not applying to extraordinary cases, the common rule respecting general average must attach here.

LORD KENYON, Ch. J :

The meaning of a general average has for a long time been well understood in the commercial world. If, in the hour of danger, masts are cut away, or goods are thrown overboard, those who are benefited by the preservation of the ship, are to contribute to the general loss thereby sustained, in proportion to their respective interests ;—but, in this case, we are delivered from all consideration respecting a general average, because we are called upon to decide on the particular stipulations contained in this charter-party. Without repeating the different passages selected by the defendant's *counsel, I am satisfied that the intention of the parties, as it is to be collected from the whole instrument, was, That the ship was to be kept in repair, and that everything that was necessary to enable the ship to perform her voyage was to be provided by the owners of the ship. Therefore, I think, that the expenses that were incurred at the Cape of Good Hope, in order to put the ship in a condition to complete her voyage, ought to be borne by the plaintiffs.

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GROSE, J. :

The only question for our consideration is that which is stated at the conclusion of the case,—on the true construction of this charter-party. It is not necessary to go through all the different articles that have been alluded to : it seems to me that the second is a guide for us in construing this instrument ; for by that it was agreed that the ship should, at the expense of the owners, be kept strong and tight during the whole of the voyage. The other articles also shew that it was the intention of the parties

JACKSON that the defendant should not bear any part of the expense of
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LAWRENCE, J. :

This is not a question of general average, but on the construction of this charter-party; namely, Whether or not all the damages done to the ship during the whole voyage were to be repaired by the owners? and on this question the second, tenth, and twenty-second articles seem decisive against the plaintiffs. By the second it was stipulated, That the vessel should, "at her departure outwards and homewards, and also during the whole of the said voyage," be kept strong and tight, "at the owners' expense." By the tenth it is particularly provided, That the defendant might, at any time during the voyage, survey the ship; and, if anything were wanting or deficient, the owners would supply it. Now, on her arrival at the Cape of Good Hope something was wanting; and therefore that should have been supplied at the expense of the owners. The eighteenth article also affords a strong argument against the plaintiffs: by that the parties agreed that, in case any of the goods should be thrown overboard for the preservation of the ship or cargo, the defendant should contribute his proportion of a general average in respect of such goods; and that shews that he was not to be liable to general average in other cases.

LE BLANC, J. :

[*515] This question depends entirely on the construction of the contract: by that, the ship owners engaged that they would, at their expense, keep the vessel in a proper state of repair during the whole voyage; in consideration of *which, they were to receive freight on the ship's return. In the course of the voyage, certain expenses were incurred in repairing the ship: and, the ship having been repaired, the plaintiffs were enabled to bring home the cargo, without which they would not have been entitled to their freight; these expenses therefore, cannot be thrown on the defendant, but must be borne by the plaintiffs, who undertook to do the repairs. This cannot be considered as a case of general average.

Postea to the plaintiffs, subject as above ; and the defendant not to bear any part of the expenses incurred at the Cape of Good Hope. JACKSON
v.
CHARNOCK.

WATSON v. M'CULLUM.

(8 T. R. 520—521.)

1800.
May 12.

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The Court will not make a submission to an award a rule of Court, where part of the matter agreed to be referred has been made the subject of an indictment.

THE plaintiff having preferred an indictment against the defendant at the quarter sessions for an assault, the parties agreed to refer all matters in dispute between them, and entered into general bonds of arbitration, in which it was agreed that their submission should be made a rule of this Court. And now

Lawes moved to make such submission a rule of Court ; but

The Court thought that such a reference could not comprehend the subject-matter of the indictment, so as to be made a rule of Court ; and that the words " controversies, suits, or quarrels " *in the statute 9 & 10 W. III. c. 15, meant only civil disputes between the parties. Therefore they [*521]

Refused the rule.

1800.
May 13.

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NUNN AND LADBROOKE, ASSIGNEES OF WILLIAM
 WILSMORE, A BANKRUPT, v. MARY WILSMORE,
 EXECUTRIX OF THOMAS WILSMORE.

(8 T. R. 521—531.)

A deed of trust conveyed the lease of a farm, and all the grantor's effects, and all debts due to him, to trustees, in consideration of a certain sum to be paid to him by one of the trustees, in trust to dispose of all the property, and out of the produce to reimburse the trustee the sum advanced by him to the grantor, and all other the trustee's demands upon him, and then to pay all such debts as were justly due from the grantor, as the trustees in their discretion should think proper, the surplus to be holden for the benefit of the grantor's wife (whose property the bulk of it originally was) as a separate maintenance for her in consequence of a separation between them, on account of her husband's ill usage; held that such deed was not fraudulent or void as against creditors, it appearing to have been made *bond fide* at the time, and that all the creditors of the grantor known at the time had, upon application to the trustees, received payment of their debts.

ASSUMPSIT for money had and received by the defendant's testator (in one count) to the use of the plaintiff Nunn, and one William Peart, a former assignee, since deceased, and in whose stead the plaintiff Ladbroke was afterwards appointed; and (in another count) to the use of the present assignees; and also upon the account stated with Nunn and Peart. The defendant pleaded, 1st, Non-assumpsit; 2dly, The Statute of Limitations; and, 3dly, *Plene administravit*; on which issues were joined. At the trial before BULLER, J. at the last assizes for Essex, a verdict was taken for the plaintiffs for 157*l.* 11*s.* subject to the opinion of this Court, on the following case:—

The bankrupt, W. Wilsmore, being a trader within the bankrupt laws, and indebted to his brother Thomas, the defendant's deceased husband, in 300*l.* and to Samuel Bullock in 130*l.* made a bill of sale of his effects, dated the 20th of July, 1792, as a security for those debts. The effects thus assigned, were thereupon sold by Bullock, who retained his own debt out of the produce; and in November, 1792, paid over the remainder (being the money for which the action was brought) to T. Wilsmore, on account of his debt. T. Wilsmore had received a

fortune of about 1,800*l.* with the defendant his wife (his own property having been about 200*l.* only); but being a man of a dissipated and unsettled turn, had contracted a number of debts. In September, 1793, he and the defendant agreed to separate, upon the terms mentioned in the following indenture, which was executed on the day it bears date; and the sum of 200*l.* therein mentioned was then advanced to him by W. Harvey one of the trustees. By indenture, dated the 1st of October, 1793, between Thomas Wilsmore, of the 1st part; Mary, the wife of said Wilsmore, of the 2d part (the defendant in the present action); *and W. Harvey, of Peldon Fanner, and T. Wilsmore the elder, of Higham, in Suffolk, of the 3d part, after reciting that the defendant had been ill treated by her husband; and that in order to put an end to their differences, and that the said T. Wilsmore the younger might no longer ill treat his wife, and in order to make some provision and maintenance for her, the said T. Wilsmore proposed, that on being paid the sum of 200*l.* for his own separate use, he would quit his farm, called Pelton Lodge, in Pelton aforesaid, and assign and transfer his farming stock, cattle, corn, &c. household goods and furniture, and also all his right and interest in the lease of the said farm and the effects thereon, and all debts due to him, unto W. Harvey and T. Wilsmore the elder, their executors, &c. and not afterwards come near, molest, or interrupt his wife, or the said trustees, on any pretence whatsoever; and also reciting, that Mary Wilsmore and T. Wilsmore the elder had besought W. Harvey to advance unto T. Wilsmore the younger the said sum of 200*l.*; which he had consented to do, upon his giving a bond and the security of the deed. It was witnessed, that in consideration of the agreement and 200*l.* to T. Wilsmore the younger, in hand, lent and paid by W. Harvey, at or before his sealing and delivery thereof, T. Wilsmore the younger did assign, transfer, and set over unto W. Harvey and T. Wilsmore the elder, all and singular the farming stock, cattle, corn, &c. household goods and furniture, goods, chattels, and effects whatsoever of him T. Wilsmore the younger, then upon or belonging to the said farm, called Pelton Lodge, or wherever else the same or any part thereof were or should be, together with his right and interest in and to the lease

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of the said farm, and all such debts as were then due and owing to him; to hold unto W. Harvey and T. Wilsmore the elder, their executors, &c. upon trust, that they (the trustees) should carry on the farming business, if they should think fit, or otherwise sell and dispose of the said goods and effects for the best price, &c. and get in the debts, &c.; and with the money arising thereby, after deducting the expenses of sale, &c. upon trust, that Harvey should out of the first monies arising by any of the ways or means aforesaid, reimburse himself as well the said 200*l.* then advanced to T. Wilsmore as aforesaid, as also such other sums as were due and owing to Harvey from T. Wilsmore the younger; and upon further trust, that they (the trustees) out of the produce of the farming business, or out of the monies arising by such sale or debts, should pay and discharge all or such part or *parts of the debts as were justly due and owing from him the said T. Wilsmore the younger; and which he had given an account of, as they W. Harvey and T. Wilsmore the elder should in their discretion think proper; and upon further trust, that the trustees should pay and apply the overplus arising from the carrying on and managing of the said farm and business, or by such sale as aforesaid, of the effects and of the said debts so to be received as aforesaid, unto the said Mary Wilsmore, to and for her sole and separate use, benefit, and disposal, and with which T. Wilsmore the younger should in nowise intermeddle. Then followed a power of attorney from Wilsmore the younger, to collect the debts then due to him; and a covenant to leave the said farm, and not to intermeddle therewith, or to molest the defendant or the trustees. In pursuance of this deed the defendant's husband left the farm (though he returned, and was received by the defendant as a visitor there for a short time in the following summer) enlisted himself as a soldier, and died in the latter end of the year 1794 intestate; the defendant being sued as executrix *de son tort*. The trustees entered upon their trust immediately, after the execution of the above deed, employed an auctioneer, and had sold the effects valued and put up to public auction in March, 1794; and paid the expenses of sale, duty, &c. No such account of the debts due from the testator having been given to the

trustees as mentioned in the deed, they, on the 10th of April, 1794, advertised in the *Chelmsford Chronicle* for all his creditors to meet, that his debts might be discharged; and they paid all such creditors as sent in their demands 20s. in the pound; after which there remained a balance of 329*l.* 19*s.* 1*d.* exclusive of the value of the lease and certain articles of household furniture and stock to the amount of 111*l.* bought in by one of the trustees at the auction, though not paid for; and which remained in the defendant's possession on the farm at the time of the husband's death, and also at the commencement of this action. The lease, which was of the value of about 500*l.* had been granted to the deceased T. Wilsmore jointly with his father, the trustee; and it contained the usual covenant and proviso against assignment. The defendant's husband alone stocked and carried on the farm until the deed of separation. The defendant has constantly resided on the farm since, and received the benefit of carrying on the same, by the produce thereof being from time to time paid over to her by the trustees. On the 23d of November, 1798, a commission of bankruptcy issued against W. *Wilsmore, founded on an act of bankruptcy, committed previous to the bill of sale to Bullock and Thomas Wilsmore, on a proper petitioning creditor's debt to support the commission. The plaintiff Nunn and the deceased W. Peart were duly chosen assignees under the commission, upon the 21st of December, 1798; and after the death of Peart, which happened about the year 1797, the plaintiff Ladbroke was duly appointed co-assignee with the other plaintiff in his place, and the usual assignment was executed to them upon the 12th of August, 1798. The defendant, in a conversation she had with Bullock about the money received under the bill of sale, whilst her husband was living absent from her under the deed of separation, and soon after the issuing of the commission, said, "Now we shall have to pay this money again:" and in another conversation about the time of the second assignment under the commission, she said, "After all the affairs were settled, there would be clear 300*l.* or 400*l.* to spare, exclusive of the value of the lease." The writ in this cause was issued on the 27th of May, 1799. The question for the opinion of the Court is, Whether, under the circumstances of this case, the

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plaintiffs are entitled to recover? If the Court are of opinion that they are, then the verdict to stand; otherwise a nonsuit to be entered.

[After arguments by *Marryatt* for the plaintiff and *Lawes* for the defendant,]

LORD KENYON, Ch. J.:

[528] Without considering the harshness of this demand on the part of the plaintiffs, I think that they cannot recover; and my opinion proceeds upon the merits of the case, on the validity of the deed of October, 1793. This question does not arise on the statute of James:† if, indeed, a commission of bankrupt had been taken out against the defendant's husband, this deed would have been, *ipso facto*, an act of bankruptcy, because it was an assignment of all his property. But, putting the bankrupt-laws out of the case, a debtor may assign all his effects for the benefit of particular creditors. With regard to the statute of Elizabeth,‡ that Act contained, no doubt, wise provisions as applicable to the cases to which it was meant to apply; and if this deed were either actually fraudulent or voluntary, from which the law infers fraud, then the consequence insisted upon by the plaintiffs would follow, and the defendant would be obliged to repay this money. But that it was [not] fraudulent in fact is perfectly clear; nor do I think that it was voluntary. Consider what was the condition of the parties: the husband and wife were living together on bad terms; the former *was squandering away the property and ill-treating the wife; and in order to prevent his ill-using her in future, and to prevent her instituting a suit in the Spiritual Court, and to put an end to all differences, and in consideration of 200*l.* advanced by one of the trustees, this deed was executed. It is said, however, that this was merely a loan of the 200*l.* by the trustee; but I do not see why this was not a consideration to support the deed. In deciding questions of this kind, the Courts have always disavowed enquiring, Whether or not the consideration be equivalent? They will not weigh it in very nice scales if it be an honest transaction. Then what was done for this valuable considera-

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† Sc. 1 Jac. 1, c. 15 (bankrupts.)

‡ 13 Eliz. c. 5.

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tion? A provision was first made for the husband himself: he was to receive 200*l.* the amount of his own property; then provision was made for the payment of all his just debts; and lastly, The residue was to be a provision for the wife so ill-used, and so deprived of an appeal to the laws of her country for alimony. I admit, that if this were a voluntary deed, the law says it is fraudulent; but I consider this deed as having been made for a valuable consideration, and not voluntary. I read over those parts of the deed not set forth in the case, in order to see whether or not the trustees had indemnified the husband against the future debts of the wife; and though the deed contain no covenant of that kind, much was to be done by the trustees: they were to enter on the farm, and to be at the expense of carrying it on. Very small considerations have been holden sufficient to give validity to a deed. Where, in framing family-settlements, limitations are made in favour of the distant branches of the family, such remainders are not considered as voluntary, if the object of the parties in making the settlement were fair and honest; but this is a much stronger case, for here there was an immediate consideration; independently of the provision for the husband, he was relieved from the consequences of a suit in the Spiritual Court; nor does it appear that there were any debts of the husband that were not satisfied. The contrary rather appears; it being stated in the case, that, in consequence of an advertisement inserted in the public papers for his creditors to come in, all who sent in their demands received 20*s.* in the pound. Therefore on the merits of this case, leaving the other question respecting the statute of limitations untouched, I am of opinion, That this deed was not only a fair and conscientious deed as between the parties, but also that there was a good consideration for it, that delivers it from all objections by those who now wish to impeach it, and consequently that the plaintiffs cannot recover in this action.

GROSE, J. :

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The principal question turns on the validity of the deed to the trustees: if that deed were fraudulent, as being made for the purpose of deceiving creditors, or if it were fraudulent in law, as

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being voluntary, the consequence would be, that the plaintiff would be entitled to recover: but there is no pretence to say that there was any actual fraud in it: no creditor was prejudiced by it; every creditor, after the advertisement in the papers, came in and received the whole amount of his debt. Then was this a voluntary deed, and so legally fraudulent? My LORD CHIEF JUSTICE has shewn, that it was given for a valuable consideration; and has gone into this point so fully, that I cannot add to what he has said.

LAWRENCE, J. :

It is evident that there was no intention in any of the parties to the deed to commit a fraud. It does not appear that any creditor was to be excluded, though that part of the deed is awkwardly worded. It could not have been intended that the plaintiffs in this action should be defrauded; for they did not exist in the character of creditors at the time when this deed was made. With regard to the supposed want of consideration, the wife had a right, under these circumstances, to apply to the Spiritual Court for alimony; but it was not necessary for her to take that step if the husband were inclined to make a provision for her without; therefore I cannot say, from any thing that appears in the case, that any fraud was intended to be practised on the creditors of the husband, or that this must be considered as a voluntary deed, for which there was no consideration; and if so, the second question does not arise here.

LE BLANC, J. :

The question is, Whether or not this deed were fraudulent or voluntary, and without any good consideration? Whether or not a deed is to be considered as fraudulent, with respect to creditors, must depend on the motives of the party making the deed. Now, at the time when this deed was executed, there was no debt due from the husband to the plaintiff; no commission of bankrupt had then been taken out against W. Wilsmore, nor does it appear that there was then any reason to apprehend that a commission would be afterwards taken out: but the husband, being liable to be called upon to answer in the Spiritual Court

for his conduct to the wife, executed this deed, by which a provision was made not only for his wife, but also for the payment of all his creditors; and it appears that all the creditors who made any demand upon this estate, received the whole of their debts; therefore I think that this deed can neither be considered as actually fraudulent, with *respect to the creditors in general, or to these plaintiffs in particular, or as voluntary, because without consideration, and therefore fraudulent in law.

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Per CURIAM :

Judgment of nonsuit to be entered.

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(8 T. R. 531—533.)

1800.
May 13.

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The owners of vessels on the navigation between A. and C. having given public notice that they would not be answerable for losses in any case, except the loss were occasioned by the want of care in the master, nor even in such case beyond 10*l.* per cent. unless extra freight were paid, the master of one of the ships took on board the plaintiff's goods, to be carried from A. to B. (an intermediate place between A. and C.) and delivered at B.; the vessel passed by B. without delivering the plaintiff's goods there, and sunk before her arrival at C. without any want of care in the master; held that the owner of the vessel was responsible to the plaintiff for the whole loss in an action on the contract.†

THIS was an action on the case, to recover damages against the defendants for not delivering, according to their contract, certain goods of the plaintiff at Stockwith, in Nottinghamshire, which were shipped on board the defendants' vessel at Hull. On the trial at Nottingham, before Mr. Baron Chambre, a verdict was found for the plaintiff, damages 7*l.* 11*s.* 5*d.* subject to the opinion of this Court, on the following case :

Messrs. Martin and Rooth, who were public wharfingers in Hull, shipped the plaintiff's goods at Hull, in March, 1799, to the value of 106*l.* 18*s.* 5*d.* with the goods of several other persons in the defendants' vessel, to be carried from thence to Stockwith,

† See and compare cases under Ex. 180; *Millen v. Brasch & Co. Carriers' Act*:—*Owen v. Burnett* (C. A. 1882) 10 Q. B. D. 142, 52 (1834) 2 Cr. & M. 353; *Hearn v. L. J. Q. B.* 127.—B. C. *L. & S. W. Ry. Co.* (1855) 24 L. J.

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which is between Hull and Gainsborough ; for the carriage of which goods it was understood, but not expressed by the parties, that the customary freight was to be paid by the plaintiff to the defendants ; but no agreement was entered into by the plaintiff for the payment of any extra freight, by way of indemnity or insurance against risk or loss. The vessel at the same time took in other goods at Hull to be delivered at Gainsborough. The freight of the carriage of goods from Hull to Stockwith is the same as from Hull to Gainsborough. The vessel had, before the voyage in question, taken in goods at Hull for Stockwith and Gainsborough ; and sometimes delivered the goods for Stockwith at that place, without carrying the same forward to Gainsborough ; and at other times, had carried the Stockwith goods forward to Gainsborough, and delivered the same at Stockwith in returning from Gainsborough. On the voyage in question, the plaintiff's goods were delivered to the master of the defendants' vessel by a clerk or servant of Messrs, Martin & Rooth, on condition that he would deliver them at Stockwith as he passed by in his way to Gainsborough ; which he (the master) expressly undertook to do. The undertaking to deliver the plaintiff's goods at Stockwith as last aforesaid, was made by the master of the defendants' vessel without the privity or knowledge of the defendants. It is not usual for the master *to confer previously with the owner of the vessels, as to the terms on which he is to take goods on board, he having a general authority or discretion to receive and convey goods for the customary freight from Hull to Stockwith and Gainsborough as above-mentioned. The defendants' vessel arrived in perfect safety at Stockwith ; and the master stopped and delivered some part of the goods which were consigned there, and was particularly requested by Mr. Dales (a wharfinger at Stockwith) to deliver the remaining part of the goods which he had on board for Stockwith ; but the master, without the privity or knowledge of the defendants, refused to deliver such goods, alleging that he was unable to deliver them by reason of their being underneath the goods intended to be delivered at Gainsborough. In proceeding from Stockwith to Gainsborough the defendants' vessel, without any want of ordinary care or attention of the master or

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crew, sunk in the river Trent, whereby the plaintiff's goods were damaged. The proceeds arising from the sale of the plaintiff's goods in their damaged state, amounting to 18*l.* 10*s.* were received by the defendants, and have since been paid into court ; and being deducted from the above sum of 106*l.* 18*s.* 5*d.* reduces the plaintiff's demand to 88*l.* 8*s.* 5*d.* ; upon which last-mentioned sum the defendants have also paid into Court the sum of 10*l.* per cent. In September and October, 1798, printed hand-bills, of which the annexed is a copy,† with the names of the defendants, and of several other owners at the foot thereof, were left at the respective dwelling-houses of the merchants and wharfingers in Hull ; and were also posted up at the Exchange and Custom-house, and at the wharfingers' staiths and warehouses, and in other public parts of the town of Hull ; but the same were not published in the Gazette, nor in the London or provincial newspapers. Martin & Rooth, by whom the plaintiff's goods were so shipped in the defendants' vessel, had such printed hand-bills left with them, and knew the contents thereof, previous to the time when they so shipped the same, but had not given any information thereof to the plaintiff, who is a grocer, and resides at Mansfield, in the county of Nottingham ; nor did the plaintiff know of any such notice having been given by the defendants. The question for the opinion of the Court is, *Whether the defendants are liable to pay any further sum beyond what they have paid into Court ? if they are so liable, then the verdict to stand ; if otherwise, a verdict to be entered for the defendants.

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When this case was called on for argument :

Lord KENYON, Ch. J. (addressing himself to the defendants' counsel) asked, Whether the defendants were not at all events liable in this action, they having had an opportunity of deliver-

† The substance of that notice was, That in future the owners of vessels would not be answerable for any loss or damage that might happen to any cargo, unless such loss or damage should be occasioned by the want of ordinary care and diligence in the master and crew ; in

which case they would pay 10*l.* per cent. upon the loss or damage, provided such payment did not exceed the value of the vessel ; but that they were willing to insure against all accidents on receiving extra freight in proportion to the value, &c.

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ing the goods at Stockwith in safety, before the vessel proceeded towards Gainsborough?

Balguy, for the defendants, answered, That this was an action on the contract, for not safely carrying and delivering the goods at Stockwith; and that the non-delivery of the goods there was owing to the misconduct in the master of the vessel, for which the defendants were not answerable in this form of action; and that if they were liable at all, the action should have been for the *tort*.

LORD KENYON, Ch. J. :

Perhaps, as between the defendants and their servant, the master of the vessel, this was misconduct in the latter; but, as between the defendants and third persons, the former are answerable upon their contract. The maxim applies here *respondeat superior*. The case is shortly this :—This vessel, belonging to the defendants, trading from Hull to Gainsborough, took on board some goods belonging to the plaintiff, which were to be delivered at Stockwith. The vessel went safe as far as Stockwith, and there delivered part of the cargo; but the master of the vessel finding it inconvenient to deliver the rest there, proceeded on her voyage, and sunk before her arrival at Gainsborough. The defendants (the owners) are called upon to make good the loss that happened to the plaintiff's goods; and as the vessel reached Stockwith in safety, and might have delivered the plaintiff's goods there, I think that this action may be maintained; for though the loss happened in consequence of the misconduct of the defendants' servant, the superiors (the defendants) are answerable for it in this action. The defendants are responsible for the acts of their servant in those things that respect his duty under them, though they are not answerable for his misconduct in those things that do not respect his duty to them; as if he were to commit an assault upon a third person in the course of his voyage.

Per CURIAM :

Postea to the plaintiff.

THE KING v. JOSEPH JUKES AND TWO OTHERS.

(8 T. R. 542—543.)

1800.
May 17.

[542]

A summary conviction for any offence created by statute, must negative every exception contained in the clause creating the offence; and a defect in omitting to do so, is not aided by a proviso in the statute, That "no conviction for any offence in the act shall be set aside for want of form, or through the mistake of any fact, circumstance, or other matter, provided the material fact alleged were proved;" for this in effect requires all material facts to be alleged; and it is a material fact that the defendant did not come within any exception in the enacting clause.

If a statute, authorising a summary conviction before a magistrate, give an appeal to the sessions, who are directed to hear and finally determine the matter, this does not take away the *certiorari*, even after such an appeal made and determined.†

THIS was a conviction on the stat. 36 Geo. III. c. 60, ss. 3 and 4,† in the following form:—"Be it remembered, That on, &c. R. Thursfield, of, &c. came before us, &c. and

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† Vide *Rex v. Mosley* and others, 2 Burr. 1042; *Rex v. Eaton*, 2 Ves. Sen. 89; and *Rex v. Sparrow* and another, *ib.* 196, n.; and vide *Cates qui tam v. Knight*, 3 Ves. Sen. 442.

‡ By s. 3, no person shall mark or cause to be marked, &c. in or upon any part of any metal button any word, &c. indicating the quality thereof, except the words "gilt" or "plated," respectively; and no person shall place or pack, or cause to be packed, &c. for sale, in or upon any card (except the pattern card, or pattern cards) or paper, &c. or expose to sale, or cause to be sold or exposed to sale, any metal buttons having any word, &c. indicating the quality thereof, other than and except the words "gilt" or "plated" respectively marked, &c. in or upon any part thereof, upon pain of forfeiting, in every such case, such buttons, together with 5*l.* for any quantity exceeding one dozen and not exceeding 12 dozen, and for any

quantity exceeding 12 dozen at the rate of 1*l.* for every 12 dozen, to be levied, &c.

Sect. 4 provides, That nothing in the Act shall extend to inflict any penalty, &c. upon any person who shall mark or cause to be marked, &c. the words "double gilt" in or upon any metal buttons, or pack or cause to be packed, &c. for sale in or upon any card (except the pattern card) or paper, &c. or expose to sale or cause to be sold or exposed to sale, any metal buttons having the words "double gilt" marked, &c. in or upon any part thereof; provided continually from the time of gilding thereof, gold shall remain equally spread upon the upper surface of the said buttons, exclusive of the edges in the proportion, &c. therein specified. The clause also contains a similar provision as to buttons having the words "treble gilt" upon them.

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informed us, That J. Jukes, &c. on, &c. did unlawfully and fraudulently put and place for sale, and cause to be put and placed for sale, in and upon certain cards and papers, divers metal buttons; to wit, 1780 dozen of metal buttons, the said metal buttons and each of them having marked or stamped on the underside thereof certain words, indicating the quality thereof, to wit, on 942 dozen, part thereof, the words 'double gilt,' and on 838 dozen, other part thereof, the words 'treble gilt,' the said buttons so respectively marked 'double gilt,' or any of them not being double gilt, within the true intent and meaning of the statute in such case made and provided; and the said buttons so marked 'treble gilt,' or any of them not being treble gilt within the true intent and meaning of the statute in such case made and provided; contrary to the form of the statute," &c.

When this case was called on :

Lord KENYON, Ch. J. observed, That this conviction could not be supported, because the information did not negative the exception introduced in the clause enacting the offence, viz. that the buttons had been exposed to sale in this instance upon the pattern cards. In like manner as in convictions on the game laws, it had always been deemed necessary to negative in the information the defendants' qualifications to kill game: that the only cases where this was not necessary to be done were, where the exception was introduced in a subsequent clause; and there it must come by way of defence on the part of the defendant.

Burton Morice, in support of the conviction, admitted that the current of authorities tended to establish that distinction, but referred to *R. v. Theed*,† where to a conviction for obstructing an excise-officer in coming to weigh candles, by virtue of the stat. 8 Ann, c. 9, s. 10 (which gives the officer *power to enter by day or night; but if by night, then it is required to be in the presence of a constable) it was objected, that it did not state whether the entry were by day or night; and *non constat* but that it might have been by night without a constable; and then the defendant might lawfully obstruct him.

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† 1 Str. 608.

LORD KENYON, Ch. J.:

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That case may, upon examination, be found to be distinguishable from those which I have before referred to; but, at all events, the weight of authorities, as applicable to this case, is the other way; and the point has been repeatedly settled in later determinations.

B. Morice then relied on the 11th section† of the act in question; by which, it is only made necessary to set out such material facts as constitute the offence charged; saying, That this was a mere formal objection, and if available at all, was matter of defence for the defendant on the hearing;—That it would not be necessary in an indictment on a statute, to negative that the defendant is within any of the provisos therein, which are matter of defence to the charge, 2 Hawk. c. 25, s. 113; and that greater form was not necessary under the 11th section than would be necessary in an indictment at common law.

LORD KENYON, Ch. J.:

This is not an objection of form but of substance; and the reason is well given by Hawkins; why a conviction should negative all the exceptions in the enacting clause, because the party cannot plead to such a conviction, and can have no remedy against it, but from an exception to some defect appearing on the face of it; and all the proceedings are in a summary manner. Therefore, the conviction itself should shew that the party accused had not the defence which the act gives to him, if true. Even by the saving clause, all material facts necessary to constitute the offence must be stated: this then is a material fact, That the buttons exposed to sale were not on pattern cards. The good sense of the thing is in support of what is said by Hawkins; for being a summary proceeding and conclusive on the defendant, it ought to have the greatest certainty on the face of it.

† Viz.:—That “no conviction, made upon any offence in this Act mentioned, shall be set aside in or by any Court for want of form, or through the mistake of any fact, circumstance, or other matter what-

soever, provided the material facts alleged in such conviction, and upon which the same shall be grounded, be proved,” &c.

‡ 2 Hawk. c. 25, s. 113.

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B. Morice then objected: that the defendant having elected to appeal to the sessions, the *certiorari* was in effect taken away by the act, because it is said that the determination of the sessions should be final;† but

LORD KENYON, Ch. J. said:

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That would be against all authority; for the *certiorari* being a beneficial writ for the subject, could *not be taken away without express words; and he thought it was much to be lamented in a variety of cases that it was taken away at all.

Per CURIAM:

Conviction quashed.

1800.
May 24.

MARSHALL v. MARY RUTTON.

(8 T. R. 545—548.)

[545]

A *feme covert* cannot contract and be sued as a *feme sole*, even though she be living apart from her husband, having a separate maintenance secured to her by deed.‡

LORD KENYON, Ch. J. delivered the judgment of the Court in this case as follows:—

This is an action of assumpsit, brought by John Marshall against Mary Rutton, for goods sold and delivered to her, for work and labour, and money laid out to her use, and on other general counts. To this the defendant has pleaded her coverture with one Isaac Rutton, who is still alive. The plaintiff has replied, that before making the promises of the defendant, she and her husband had mutually covenanted and agreed to live separate and apart; that a separation accordingly took place between them: and that they have continually from thenceforth lived, and still live, separate and apart; that a competent separate maintenance suitable to the estate and degree of the defendant, of 200*l.* per annum, was in due form of law secured

† s. 9.

‡ As to the extent to which the principle of the Common Law is modified by the Married Women's Property Act, 1882, see *Palliser v. Gurney* (C. A. 1887) 19 Q. B. D.

519, 56 L. J. Q. B. 546; *Scott v. Morley* (C. A. 1887) 20 Q. B. D. 120, 57 L. J. Q. B. 43; and *Stogdon v. Lee*, C. A. from Q. B. D. '91, 1 Q. B. 661, 60 L. J. Q. B. 669.—R. C.

to her by deed, during the joint lives of her and her husband, which has been duly paid to her; and that the promises in the declaration were made subsequent to the separation of her and her husband. The defendant has rejoined, admitting the separation between the defendant and her husband before the promises, &c. and stating the deed mentioned in the replication as being a deed of articles of agreement made between the said Isaac Rutton and herself of the one part, and Thomas Rutton of the other, whereby it was provided that the separate maintenance should be paid for such time only as the defendant should suffer the said Isaac Rutton to live separate and apart from her, and the defendant should maintain a chaste, due, and becoming conduct, and should support and keep Mary Rutton and Elizabeth Rutton their two youngest children, without any other charge or incumbrance to the said Isaac Rutton, &c.; concluding with a traverse of the said separate maintenance being secured to her during the joint lives of her and her husband. To this rejoinder the plaintiff, having cravedoyer of the articles of agreement, has demurred, assigning various causes which need not be stated; and the defendant has joined in demurrer.

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The general question, which arises on this record is, Whether by any agreement between a man and his wife, she may be made legally responsible for the contracts she may enter into, and be liable to the actions of those who may have trusted to her engagements, as if she were sole and unmarried? On account of the magnitude of the question, and from respect to the authority and learning of those Judges, who in some late cases have holden that a *feme covert* living so separate from her husband is liable to be thus sued, we thought this a case fit to be argued before all the Judges: and it has been twice argued, once in Easter Term, 1798,† before all the then Judges, except Mr. Baron PERAYN, and again in this Term before all the present Judges, except Mr. Justice BULLER, whose absence on every account we had occasion to lament; and after a very full

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† The case was argued the first time by *Wuthen* for the plaintiff, and *Guslee* for the defendant; the second time by *Law* for the plaintiff, and *Bayley*, Serjt. for the defendant.

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consideration, the opinion of all the Judges who heard the last argument is, that this action cannot be supported.

The ground on which the plaintiff in this case rests his claim, is an agreement between the defendant and her husband to live separate and apart from each other. That is, a contract supposed to be made between two parties, who according to the text of Littleton, s. 168, being in law but one person, are on that account unable to contract with each other: and if the foundation fail, the consequence is, that the whole superstructure must also fail. This difficulty meets the plaintiff *in limine*. If it did not, and the parties were competent to contract at all, it would then become material to consider how far a compact could be valid, which has for its object the contravention of the general policy of the law in settling the relations of domestic life, and which the public is interested to preserve; and which, without dissolving the bond of marriage, would place the parties in some respects in the condition of being single, and leave them in others subject to the consequences of being married; and which would introduce all the confusion and inconvenience which must necessarily result from so anomalous and mixed a character. In the course of the argument some of these difficulties were pointed out; and it was asked, Whether, after such an agreement as this, the temporal courts could prohibit, if either party were to sue in the Ecclesiastical Court for the restitution of conjugal rights? Whether the wife, if she committed *a felony in the presence of her husband, would be liable to conviction? Whether they could be witnesses for and against each other? Whether they could sue and take each other in execution?—and many other questions will occur to every one, to which it will be impossible to give a satisfactory answer. For instance, it may be asked, How it can be in the power of any persons by their private agreement to alter the character and condition which by law results from the state of marriage while it subsists, and from thence to infer rights of action and legal responsibilities as consequences following from such alteration of character and condition? or how any power short of that of the Legislature can change that, which by the common law of the land is established as the course of judicial proceedings?

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The argument in favour of the plaintiff rested on this position only, as a principle, viz. That where the husband ceases to be the protector of his wife, and is not liable to have any claim made on him for her support and maintenance, it necessarily follows that she herself must be her own protectress, make contracts for herself, and be responsible for them. But if this were a necessary consequence, it would hold in all cases: but that is not so; for if a woman should elope from her husband, withdraw herself from his protection, and live in adultery, he is not by law liable to answer for her necessaries; and no case has decided that the woman is. A wife living apart from her husband, and who has property secured to her own separate use, must apply that property to her support, as her occasions may call for it; and if those who know her condition, instead of requiring immediate payment, give credit to her, they have no greater reason to complain of not being able to sue her than others who have nothing to confide in but the honour of those they trust. From the incapacity of a married woman to contract, or to possess personal property which may be the subject of contract, men and their wives desirous of living separate have found it necessary to have recourse to the intervention of trustees, in whom the property, of which it is intended she shall have the disposition, may vest uncontrolled by the rights of her husband, and with whom he may contract for her benefit; but in such property the woman herself acquires no legal interest whatsoever. Of such trusts, courts of equity alone can take notice; they can cause the fund to be brought before them to be applied, as in justice it ought to be; and in those Courts the creditor must prefer his claim.

The earliest cases on this subject proceed on the ground of the husband being considered as dead, and the woman as being in a state of widowhood, or as divorced *à vinculo matrimonii*, in which light Rutton and his wife do not stand; and until the cases of *Ringstead v. Lady Lanesborough*,† *Barwell v. Brooks*,‡ and some subsequent cases, which we wished to have reconsidered, we find no authority in the books to shew that a man and his wife can

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† 3 Dougl. 197.

‡ There is no reference to this case

in the original report, nor is it to be traced in the usual digests.

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For these reasons our opinion, in conformity with that of all the Judges who heard the last argument, is, That there must be judgment for the defendant.

Judgment for the defendant.

His Lordship afterwards desired that it might be understood, that the late Lord Chief Justice EYRE, who had heard the first argument, entirely concurred in this opinion.

1300.
May 5.

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(8 T. R. 548—561.)

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Trading with an enemy without the King's licence is illegal. And it is illegal for a subject in time of war, without the King's licence, to bring even in a neutral ship goods from an enemy's port, which were purchased by his agent resident in the enemy's country, after the commencement of hostilities, although it may not appear that they were purchased of an enemy.

UPON a writ of error brought from the Court of Common Pleas, it appeared that Bell and others brought an action against Potts, upon a policy of insurance on the ship *Elizabeth*, and goods on board, at and from Rotterdam to Hull, with liberty to touch and stay at any ports or places, &c. and declared as for a loss of the goods loaded on board by capture by enemies. There were other counts for money had and received, and upon an account stated; to which the general issue was pleaded.

At the trial a verdict was found for the plaintiffs below; and a bill of exceptions was tendered and allowed on the part of the plaintiff in error, whereby it appeared, that at the trial the plaintiffs below proved in evidence the policy of assurance in the declaration mentioned, subscribed by Potts, and dated the 7th of December, 1797; and that the policy was effected in London by Barrett & Company, insurance brokers there, by the orders, and for the benefit and risk of the plaintiffs, then and still being.

British merchants resident in London, and interested in the goods insured to the value mentioned. That the ship *Elizabeth* was a neutral ship belonging to H. Bannermann & Son, of Greetsil and Embden, in Prussia, bound on *the voyage insured from Rotterdam to Hull; and that the clearance of the ship was ostensibly from Rotterdam to Norden, because the persons then exercising the powers of government in the United Provinces, would not permit the ship to be cleared out from Rotterdam to Hull, or any other port of Great Britain; and that the goods insured, consisting of sixty casks of madders, were laden on board the *Elizabeth* at Rotterdam, to be conveyed from thence to Hull by one Robert Twiss, then being the agent of the plaintiffs below, and residing at Rotterdam, by their orders and for their use, and were consigned by him to Messrs. Hewson & Gunnes, at Hull, who then were the agents of the plaintiffs below, by their order and for their sole account and risk. That the ship *Elizabeth*, having the goods insured afterwards on the 18th of December, 1797, sailed from Rotterdam for Hull, and was captured on her voyage the next day by a French ship, an enemy to the King; whereupon the counsel for the plaintiff in error, on his part, proved in evidence that the said sixty casks of madders, before the lading of them on board the *Elizabeth*, and before the policy was subscribed, were purchased by Twiss their agent, resident at Rotterdam, in order to be sent from Rotterdam to Hull, on their account and risk at London, and were afterwards laden on board the ship at Rotterdam for that purpose. The six bills of exchange were drawn by Twiss, in payment for the madders at Rotterdam, but dated at Hamburg, upon the defendants in error; and which bills having been indorsed by the payees thereof respectively, were afterwards duly accepted and paid by the said defendants in error in London. That before and at the time of the said purchase of the said sixty casks of madders by Twiss, and of the loading of them on board the *Elizabeth*, in order to be conveyed from Rotterdam to Hull, for and on account of the defendants in error, and also before and at the time that the plaintiff in error subscribed the policy of assurance thereon, and before and at the time of the ship's departure from Rotterdam towards Hull, and of the capture of

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the said ship and madders as aforesaid, hostilities had commenced, and still existed between Great Britain and the persons exercising the powers of government in the said United Provinces. That the plaintiff in error also proved the payment of the premium into Court in this action ; whereupon the counsel for the plaintiff in error insisted at the trial, that upon the matter so proved in evidence, the plaintiffs below were not entitled to recover against him ; that the policy upon the said madders was void, * for that it is not lawful for British subjects to carry on trade with any nation which at the time is in a state of open war and hostilities with Great Britain, nor to purchase any goods in such nation, and import them from thence to Great Britain. The bill of exceptions then stated the Judge's direction to the jury, to find a verdict for the plaintiffs below, the finding of such verdict accordingly, and the assignment of errors thereon in the usual form.

This case was first argued in Michaelmas Term last.

Gibbs, for the plaintiff in error :

This is an illegal insurance, because it was made to protect the transportation of goods purchased in an enemy's country into this ; and by the common law, all trading with an enemy is illegal. It appears on the record, that there was open war between this country and Holland ; that during that time Bell's agent, resident in the enemy's country, purchased the goods in question for him there, which is direct trading with an enemy ; and that Bell afterwards made the contract with Potts, on which this action was brought in order to secure to himself the benefit of such illegal trading. But if the original act were unlawful, no subsequent contract for giving it effect can be supported in law. Trading with an enemy has always been deemed illegal in a subject, on account of the mischievous consequences which ensue from it. The intercourse which it creates between subjects of hostile states, necessarily tends to facilitate the conveyance of intelligence to the enemy. The practice of granting licences by the Crown for such an intercourse in particular cases, from the earliest times down to the present, shews strongly what the common law is in this respect ; in addition to which there is a direct authority against the legality of such a trading, in 2 Rol.

Abr. 173, pl. 3, (tit. Prerogative, L. Guerre); where trading with Scotland, then in a state of general enmity with this kingdom, was deemed illegal; but the merchants having acted under a licence granted to them by the keepers of the truce, were pardoned by the King. This was adverted to in the case of *Gist v. Mason*,† by Lord MANSFIELD, who also mentioned another instance, where trading with an enemy was deemed unlawful, from a note given to him by Lord HARDWICKE on a reference to all the Judges in the time of King William III. Whether it were a crime at common law to carry corn to an enemy?—who were of opinion that it was a misdemeanour. Lord MANSFIELD also *there said, That by the maritime law, trading with an enemy is cause of confiscation in a subject. Upon the same principle, it was holden illegal in the case of *Bristow v. Towers*‡ to insure an enemy's property. Now this is in effect the same thing; for the enemy gets the price of his goods, and he has equally the advantage of our market, without any risk. Questions of this sort more frequently occur in the Courts of Admiralty, to which jurisdiction they properly belong; and there it is a settled maxim, That trading with an enemy is cause of confiscation, if the vessel on board which the goods insured are loaded be captured by any of our cruizers and condemned; and such a condemnation, being a sentence in *rem*, would be conclusive evidence in the Courts of Common Law, that the ship was engaged in an illegal traffic; as was ruled by Lord KENYON in the case of *Nesbitt v. Whitmore*, at the last sittings at Guildhall. This Court then, for the sake of consistency, should be governed by the same law as they would have been if the vessel had been stopped at sea and brought in by our cruisers.

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Wigley, contrd :

It is by no means settled as a principle of law, That all trading with an enemy is illegal, even supposing that the decision of that question would govern the present: the law makes express provision for the safety of the persons and property of foreign merchants belonging to an enemy's country, resident here in time of war. 1 Blac. Com. 260. In *Henkle v. The Royal Ex-*

† 1 B. R. 154, 1 T. R. 88.

‡ 6 T. R. 35.

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change Assurance Company,† Lord HARDWICKE said, “It might be going too far to say, That all trading with an enemy is unlawful; for the general doctrine would go a great way, even where only English goods were exported and none of the enemy’s imported, which may be very beneficial.” Lord MANSFIELD, in *Gist v. Mason*, stated the doctrine very doubtfully, and in terms which rather shew the leaning of his opinion to have been the other way. Much may depend upon the particular sort of trading. In time of war, it is well known that certain articles are deemed contraband, even with respect to neutrals, such as furnish the enemy with the means of resistance or annoyance; namely, provisions, warlike stores, and the like. To trade with an enemy in such articles, is undoubtedly illegal. The instance mentioned by Lord MANSFIELD, of supplying an enemy with corn, was evidently of this sort. What the trading was in the case mentioned in Rolle’s Abridgement, does not appear; possibly it was *of the latter kind;—but, at any rate, that case differs from this; for there our merchants went into an enemy’s country to trade; and here the trading was through the medium of neutrals. This distinction will also account for the granting of licences by the Crown, from time to time, to trade with enemies; for a variety of articles have, at different periods, as circumstances varied, been deemed to be contraband; in which case, it never was disputed but that a licence from the Crown was necessary for the protection of the trader. In *Brandon v. Nesbitt*,‡ and *Bristow v. Towers*,§ the general question concerning the legality of trading with an enemy was much discussed at the bar; but nothing was decided upon that point. In the one, it was holden that no action could be maintained by an alien enemy; and, in the other, that an insurance of enemy’s property was void; but neither of those decisions affects this question: and in *Bell v. Gilson*,|| arising out of the same transaction as the present, in the Common Pleas, the Court held the insurance of goods, purchased in an enemy’s country, to be legal; but, even if a direct trading or intercourse with an enemy were illegal, it would not follow that the same rule would apply to a case like the present,

† 1 Ves. Sen. 320.

‡ 3 R. R. 109, 6 T. R. 23.

§ 6 T. R. 35.

|| 4 R. R. 823, 1 Bos. & P. 345.

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where no direct personal intercourse took place, but the trading was through the medium of a neutral power; for this removes all objections, on account of the impolicy of the measure, and indeed throws such arguments into the opposite scale. The goods insured are necessary to be had, for the purpose of carrying on the manufactures of this country; which supply us with the resources for war. It must be admitted, that it would have been legal to have purchased such a commodity from a neutral power, without any consideration of the country from whence the neutral had originally obtained it. Then, it is much more advantageous for the subjects of this country to import the commodity directly in a neutral bottom from the country of its growth, than to pay the additional profit which will accrue to the neutral, from its first passing through his hands.

But, in fact, this is not a trading with an enemy; for at the time when these goods were purchased in Holland, war had not been declared between the two countries, though letters of marque and reprisals had been granted. Hostilities, says Lord Hale,† may exist without open war. So the King, by his prerogative, may, in a declaration of war, except certain of the *enemy's subjects.‡ A declaration of war generally contains a prohibition to trade with the enemy; but a proclamation for marque and reprisals only, does not; and it is only from the prohibition of the King, by virtue of his prerogative, that the illegality arises. It is not stated that the goods were purchased of an enemy, nor even in an enemy's country, but only that they were shipped from Holland, under the circumstances before stated. The particular period when the goods were purchased is not mentioned; and this is the more material, because by the treaty before subsisting between England and Holland, it was stipulated, That in case of war, the subjects of either country respectively should have six months to retire to their own country, with their property. This amounts to a licence to the subject to bring away his property within that time; but at any rate the King's licence, obtained after the shipping of the goods, was sufficient to legalize the whole adventure.

He then argued upon the effect of several temporary Acts of

† 1 Hale P. C. 162.

‡ 1 Ld. Ray. 283.

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Parliament, allowing the importation of Dutch property into this country about the period of this transaction ; but the Court thought that those Acts did not apply to a case like the present.

Gibbs, in reply :

The Court will take notice of the existence of open war between this and any other country, if it be necessary, though it be not expressly so stated on the record ; but it is sufficient to state, as here, that hostilities existed at the time, which is equivalent to open war. Here the original purchase of the goods was unlawful ; and therefore this case is different from that of foreign merchants under the general law, and also from the case of those Dutch subjects, who were to be protected by the temporary Acts, passed in consequence of the state of things in Holland at the time. It was not intended to bring these goods into England under the sanction of those Acts. If this trade be beneficial to the country, either the Legislature will legalize it, or the Crown, upon application, will grant its licence for carrying it on ; but that is a matter resting in the discretion of the King ; upon which he ought to have the power of deciding in each particular instance. The distinction attempted to be taken between the case in *Rolle* and the present is not material ; for the illegal act was considered to be the trading with the enemy, and not the mere going into the enemy's country ; and so that case was considered by Lord MANSFIELD, in *Gist v. Mason*.†

[*554] In the course of the argument, the counsel on both sides referred *to some cases which had been decided at the Admiralty Court, and at the Cockpit ; and this Court, considering that the subject was more frequently discussed there than in Westminster Hall, desired to hear a second argument by civilians. Accordingly, in Hilary Term last, the case was argued by

Sir John Nicholl,‡ the King's advocate, for the plaintiff, in error :

A subject of this country cannot trade with an enemy without the King's licence ; and under the circumstances stated in the

† 1 R. R. 154, 1 T. R. 88.

‡ Friday, February 7th.

special verdict, if these goods had been taken at sea by any of our cruisers, and brought into the Court of Prize, they must necessarily have been condemned as prize. This rule has been long settled; and is so undeniable, that it is unnecessary to enter into the principles on which it is founded, which must now be presumed to be politic, wise, and just. Nor will it be necessary to enter into arguments to shew that there can be no distinction between policies of insurance and other contracts in this respect; for if trading with an enemy be illegal generally, it must be so in this particular instance; and every contract of indemnity against the risks attendant on such trading, must also be illegal. There is no distinction between policies of insurance made to protect an adventure against the common law, and those against the law of the Admiralty, which equally forms a branch of the general jurisprudence of the kingdom. Neither is it important to discuss the policy of trading with an enemy for particular articles useful in manufactures, agriculture, or war; because the Crown will, in its discretion, judge of each particular instance, and grant or refuse a licence to trade accordingly. Nor is there any distinction as to the question of prize, between a declaration of war generally and a proclamation for reprisals; the consequence would be the same in either case upon the question now before the Court. War puts every individual of the respective governments, as well as the governments themselves, into a state of hostility with each other. There is no such thing as a war for arms and a peace for commerce. In that state all treaties, civil contracts, and rights of property, are put an end to. Vattel, b. 3, c. 5, s. 70. The same author (b. 3, c. 15. s. 226) shews that the principle of the law imposes a duty on every subject to attack the enemy, and seize his property wherever found; though by custom this is restrained to those individuals only who have commissions for that purpose from their government. Now trading, which supposes the existence of civil contracts and relations, and a reference to courts of justice† and the rights of property, is necessarily contradictory to a state of war. Besides, it is criminal in a subject to aid and comfort the enemy; and trading affords that aid and comfort in

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† Vide Bynk. b. 1, c. 7, and the case of *The Hoop*, 1 Rob. Admir. Rep. 201.

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the most effectual manner, by enabling the merchants of the enemy's country to support their government. Export duties are to be paid when goods are brought from an enemy's country, which is furnishing the very sinews of war to the hostile government. These considerations apply with peculiar force to maritime states, where the principal object is to destroy the marine and commerce of the enemy, in order to enforce them to peace. It may be said indeed, that such a trading also benefits ourselves, especially if the balance of trade be in our favour. However, it belongs not to individuals, but to the state alone, to balance these benefits; and such a power will best be exercised by granting licences to particular persons, or as to particular commodities, according to the exigency of particular circumstances; for the same reasons, a subject cannot trade with an enemy, even from a neutral country, unless he has acquired a right of citizenship in that country; but certainly, if he reside in this country, he cannot so trade through the medium of a neutral agent: and, *à fortiori*, it is unlawful for him to do so where the trading, as in this case, is direct from the enemy's country to this. The above reasoning is further strengthened by this consideration, That if such direct trading were to be permitted, it would facilitate the means of carrying on a traitorous correspondence, which would greatly counterbalance any little advantage likely to accrue to the individual members of the community from such trading. Further: It has been the practice in all wars to obtain licences from the Crown for any direct intercourse with an enemy's country; and the same has been done during the present war. The Governor of Jamaica has power given to him to licence trading with the Spanish West India settlements; which he has exercised accordingly. The Governor of Gibraltar has the same power with respect to Spain. The same has been, at different periods of the war, exercised by the government at home in regard to Holland. Now the very circumstance of granting such licences from time to time shews, that without them the trading with an enemy has always been considered illegal. The exception proves the general rule. It is not only the practice of this country thus to regulate the intercourse of its subjects with the enemies, but the

same general law prevails throughout Europe,[†] and has been *acted upon in the present war by France, Spain, and Holland. This principle is also recognized in our books. In the case of *Henkle v. The London Exchange Assurance Company*,[‡] the then *Solicitor-General* (Lord MANSFIELD) admitted in argument, That any trading with an enemy was a misdemeanor; and that by the Maritime Law it was cause of confiscation. All the learning on this subject was fully examined and elucidated in a late case of *The Hoop*,[§] by Sir W. SCOTT. It was there attempted to set up an exception to the general rule, That all trading with an enemy is illegal; but the universality of the rule was established; and in giving judgment, the learned Judge adverted to the principal leading authorities and cases on the subject. (He then read the following notes of cases, taken partly from the MS. notes of Sir Edward Simpson, which are a valuable and authentic collection of Admiralty decisions,—and partly from the printed report by Dr. Robinson, of the judgment delivered by Sir W. SCOTT, in the case of *The Hoop*, before referred to.) “The case of *St. Philip*, in 1747, at the Cockpit,|| Lord Ch. J. WILLIS being present. The Lords refused to give the claimants liberty to prove, that goods which had been captured and condemned as prize, were bought before the war, the CHIEF JUSTICE being clearly of opinion that the effects of British subjects taken, trading with the enemy, are good prize.” This establishes the rule, That trading with an enemy is subject of confiscation, and excludes any exception, even on the ground that the goods had been purchased before the war; *à fortiori*, therefore, if, as in this case, they were purchased after the commencement of hostilities. “The case of *The Elizabeth*, of Ostend ¶ in 1749. Present, Sir Thomas Dennison, and either Mr. Justice Birch, or Mr. Justice Clive. The cargo taken and condemned as coming from an enemy’s port, was claimed to be the property of British subjects. The Lords of Appeal, by their sentence, restored the goods claimed by Gould, a British subject born, but established

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† Bynk. Q. J. P. b. 1, c. 3.

‡ This is reported in 1 Ves. Sen. 317; but the King’s Advocate read a note of it from Sir Thos. Sewell’s brief.

§ 1 Rob. Adm. Rep. 196.

|| Sir E. Simpson’s MSS.

¶ *Ibid*; and also cited in 1 Rob. Rep. 202, though not so fully stated.

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at the time in the dominions of the Queen of Hungary; but rejected the claim of Henckell and others, who were then and still subjects of his Majesty. Sir E. Simpson's note on the above case is, That the Lords condemned all the goods of English subjects, the Judges being clearly of opinion that they were prize of war, and confiscable. *All trading with an enemy was condemned by the Lords of Appeal in 1704. The same note also refers to several other instances of ships condemned on this account; amongst others, "*The Mary*, of Wexford, in 1707, for trading to Spain."—" *The Ringende Jacob*, in 1747,† a Swedish ship, went from London to Bourdeaux, and took in wine for British subjects, to be delivered at Guernsey; but with false clearances at Bourdeaux, in order to deceive the enemy. She was condemned by the Lords of Appeal on the 7th of February, 1750, in affirmance of the judgment of the Admiralty court."—"The cargo of the *Lady Jane*,‡ a Hamburg ship, laden at Malaga with wine, was claimed by English merchants as the produce of goods sent to Spain before the war; but it was condemned by the Lords of Appeal: present Mr. Baron Clarke."—" *The Deergarden*, of Stockholm,§ was laden with woollen goods, shipped ostensibly at Lisbon, the voyage being in fact to Bilboa, an enemy's port, but on British account. The cargo was condemned on the 15th of March, 1747."—" *The Juffrouw Louisa Margaretha*,|| before the Lords the 3rd of April, 1781 (otherwise called *Escott's case*). This was a claim by Messrs. Escott & Read, of London, for wines, &c. shipped on board a Dutch ship in 1780, at Malaga, on their account: and it was stated, That the house of Escott & Read had for twenty years before the preceding hostilities between Great Britain and Spain, traded to and from Malaga, where they had an established house of trade, and where Mr. Escott had resided for thirty years till the last ten months, when he had resided in England: that a great quantity of wine belonging to the house had been left at Malaga till a favourable opportunity offered of sending it to London: that the destination was to Ostend; and the property described to be for neutral account and risk, in order to avoid the enemy's

† 1 Rob. Rep. 202.

‡ *Ib.*

§ *Ib.*

|| *Ib.* 203.

cruisers. The whole was therefore claimed as British property, subject to a per centage for commission to their foreign correspondent: but the judgment of the Court of Admiralty rejecting the claim of Mr. Escott was affirmed by the Lords. Present Lord Loughborough, then Ch. J. of C. B. and Sir J. Eardley Wilmot."—"The *St. Louis*, alias *El Alessandro* † (otherwise called *The New Orleans* case) before the Lords, July 18th, 1781. This was a claim of Messrs. Morgan & Mather, for certain peltries, shipped by them on board a vessel of New Orleans, bound to Bourdeaux, and consigned to *merchants there, on account of the shippers. It appeared that Morgan had left England, and settled in West Florida, in 1764: that finding no protection from the British government to those settled on the banks of the Mississippi, he had kept a ship as a floating store-house from 1774, living himself at New Orleans, by permission of the Governor, on condition of not landing any goods on the Spanish territories: that in 1779, finding that the American troops were in such force on that river as to prevent any English ship from coming up, and that it was impossible to make any remittances to England but in neutral vessels, he shipped the goods in question on board the *St. Louis*, a neutral ship, being the only vessel at New Orleans bound for Europe: that they were consigned to merchants at Bourdeaux to be there sold; and the proceeds remitted to Mather in London; and that he was obliged to resort to this mode of remittance, that the goods might not perish on his hands. There was also a certificate from the British commander in those parts in America, certifying that Mr. Morgan, a British subject, had received permission, under a capitulation with the enemy, to convey himself and family to London, under a passport from the Spanish Governor. Nevertheless, the ship and property were condemned in the Admiralty Court as enemy's property, or otherwise liable to confiscation; and this sentence was confirmed by the Lords. Present Lord Loughborough, Ch. J. of C. B. But some of the same person's property, sent in another ship from New Orleans, consigned directly for London, was restored."—"The *Compte de Wohronzoff* ‡ before the Lords on the 19th of July, 1781 (otherwise called

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† 1 Rob. Rep. 204.

‡ Ib. 205.

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the *Irish* case). This was a claim of Daley and other Irish merchants, for the vessel and certain French wines, shipped at Bourdeaux, in May, 1780, on their account, with ostensible papers for Russia: in support of which it was stated, That during the whole war the Commissioners of Revenue and Excise in Ireland had constantly permitted such a trade to be carried on from Bourdeaux to Dublin in the same manner as before hostilities, by British subjects, on their account, in British ships: that this was done openly, and regular entries made of the same, and the duties paid; that subsequent to hostilities, an Act passed the Irish Legislature, laying an additional duty on French wines imported from June, 1780, to December, 1781; which, it was contended, was a direct recognition of the legality of this traffic. Nevertheless, the judgment of the Court of Admiralty, condemning *the ship and cargo as lawful prize, was affirmed; present Lord Bathurst and Lord Loughborough.”—“*The Expedite Van Rotterdam* † (otherwise called the *Levant* case) before the Lords, 18th July, 1782. This was a claim by Gregory & Turnbull, of London, for wine shipped on board a Dutch ship on the 20th of December, 1780, at Malaga for them, though ostensibly for the account and risk of Thomasze of Amsterdam their agent, Holland being then at peace with this country. The claimants relied on an Act of the 20 Geo. III. permitting the product or manufacture of certain places within the Levant to be imported into Great Britain or Ireland, in British or neutral vessels from any place whatsoever. But the Court of Admiralty, not thinking that the Act referred to applied to this case, condemned the goods; which sentence was affirmed by the Lords; present Lord Camden and Lord Ashburton.”—“*The Bella Guidita* ‡ (otherwise called the *Grenada* case) before the Lords, 20 July, 1785. After the capture of Grenada by the French, Mr. Vaughan and other British merchants sent a cargo of provisions on board a neutral ship from Ireland to Grenada, intending to bring back in return plantation produce, in payment of the debts owing from proprietors of estates in that island to British merchants. This traffic had been carried on between the conquered islands of Great Britain for some time before, and till the then recent

† 1 Rob. Rep. 206.

‡ *Id.* 207.

breaking out of hostilities with Holland, through the medium of St. Eustatia, a Dutch colony, under the sanction of British Acts of Parliament. And after the Dutch hostilities, an act passed 20 Geo. III. reciting the capture of Grenada by the French, and that it was expedient and just to relieve the proprietors of estates there; and enacting that no goods of the growth, &c. of the island, on board neutral vessels going to neutral ports, should be liable to condemnation as prize. The judgment of the Vice Admiralty Court of Barbadoes, condemning the cargo as French property, was affirmed; present Lord Camden."—" *The Elnigheid*,† before the Lords 21st March, 1795. There corn, which was shipped on account of British and Dutch merchants, on board a Lubeck ship from Rotterdam to Nantes, before war declared by France against England and Holland, but which from accidental circumstances did not sail till afterwards, being taken, was adjudged good prize by the Court of Admiralty; and afterwards on appeal; present Sir R. P. Arden, Master of the Rolls, and Eyre, Lord Ch. J. of *C. B."—" *The Fortuna*,‡ before the Lords, 27th of June, 1795.§ There a cargo of wine had been shipped by British merchants carrying on trade at Barcelona, on board a Swedish vessel at Barcelona, in January, 1793, and destined for Calais. She was first captured by a Spanish frigate in April, and released by the Spanish Court of Admiralty; after which she was again captured by one of our cruisers. It was contended for the captors, that the cargo was liable to confiscation, because the ship sailed from Spain for Calais subsequent to the commencement of hostilities by France against England and Spain, which it was incumbent on the proprietors to have prevented, or at least to have endeavoured to do so. The sentence of condemnation was affirmed."—" *The Freedon*§ was a case of the same description as the last; but there the British merchants were permitted to produce evidence to shew, that immediately after the breaking out of hostilities, they had used their best endeavours to prevent being implicated in the illegal commerce on their account from Barcelona to Ostend; but, failing in this, the cargo was condemned in the Court of

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† 1 Rob. Rep. 210.

§ 1b. 213.

‡ 1b. 212.

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Admiralty; which sentence on appeal was affirmed; present the Master of the Rolls."—"The *William*,† before the Lords, December 19th, 1795. Prior to the war between France and Great Britain the claimants, who were British subjects in Grenada, were creditors of certain French merchants in Guadeloupe, and after the war broke out, the agent of the claimants in Guadeloupe received the cargo of sugars in question, in payment of that debt, and shipped them on their account. The sentence of the vice-admiralty court of St. Christopher condemning the ship and cargo was affirmed; present the Master of the Rolls." Upon the authority of this long train of decisions, the judgment in the principal case of the *Hoop*,‡ proceeded. There Mr. Malcom of Glasgow, and other Scotch merchants, had traded to Holland for articles necessary for the agriculture and manufactures of that part of the country, for which they had several times before applied for and obtained the King's licence; but after the passing of certain Acts of Parliament, having upon application to the commissioners of the customs at Glasgow, been informed (erroneously as it afterwards appeared) that such licences were no longer necessary, they had omitted to obtain one on that occasion; in consequence of which, the cargo being taken was condemned as prize, on the general ground that all trading with *an enemy, without the King's licence, was illegal, and cause of confiscation. These cases also shew that there is no distinction between trading with an enemy and with an enemy's country; nor is such a distinction warranted in principle; for all persons inhabiting an enemy's country are presumed to be enemies. Aid is equally given to the enemy by such trading, whether the goods be furnished immediately by an enemy or neutral merchant; and the danger of traitorous correspondence is the same.

Dr. Swabey, contra, admitted that, so far as the question of prize affected the decision of this case, the principles advanced and authorities cited on the part of the plaintiff in error by the King's advocate, could not be disputed; but how far that concluded the question as to the legality of the insurance at common

† 1 Rob. Rep. 214.

‡ 1b. 196.

law, or whether the obtaining of a licence from the crown prior to the capture, would make any difference, he begged leave to refer to the arguments of the common lawyers on behalf of the defendants in error.

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Curia adv. vult.

LORD KENYON, Ch. J. now said :

That the Court had very fully considered the question immediately after the very learned argument which had been made by the King's advocate in the last Term :—That the reasons which he had urged, and the authorities he had cited, were so many, so uniform, and so conclusive, to shew that a British subject's trading with an enemy was illegal, that the question might be considered as finally at rest :—That those authorities, it was true, were mostly drawn from the decisions of the Admiralty Courts : and that, after all the diligence which had been used, there was only one direct authority on the subject to be found in the common law books, and that one was to the same effect ; but that the circumstance of there being that single case only, was strong to shew that the point had not been since disputed, and that it might now be taken for granted that it was a principle of the common law, That trading with an enemy without the King's licence, was illegal in British subjects :—That it was therefore needless, in this case, to delay giving judgment for the sake of pronouncing the opinion of the Court in more formal terms ; more especially as they could do little more than recapitulate the judgment, with the long train of authorities already to be found, in the clearest terms, in the printed report of the case of the *Hoop*, published by Dr. Robinson :—That the consequence was, that the judgment of the Court of Common Pleas must be reversed.

Per CURIAM :

*Judgment reverse*d*.*

1800.
May 16.

BIRD AND OTHERS v. APPLETON.

(8 T. R. 562—571.)

[562]

Goods may be insured, though purchased with the proceeds of a former illegal cargo. An insurance on goods on board a ship for a particular voyage is legal, though she may have done some act in a former voyage for which she was liable to seizure.

A warranty of neutrality in a policy of assurance, is not falsified by a sentence of a foreign court of Admiralty condemning a ship for navigating contrary to the ordinances of that belligerent state to which the neutral country had not assented.

THE first count in the declaration was on a policy of assurance on goods, on board the *Confederacy*, an American ship, “at and from Canton, in China, to Hamburgh or Copenhagen, with liberty to touch, stay, and trade at all ports and places whatsoever, particularly a port in the channel,” effected by the plaintiffs, for the benefit and on the account of Leffingwell and another. The second count was on a policy on the ship *Confederacy*, “at and from Canton,” &c. as in the first count. It was stated, That the ship sailed from Canton, having the goods on board, and that she was taken as prize in the course of her voyage, before her arrival at Hamburgh or Copenhagen. The defendant pleaded the general issue; and, on the trial before Lord Kenyon, a special verdict was found.

In the special verdict it was stated, That the plaintiffs caused to be effected the two policies of assurance, mentioned in the declaration, for Leffingwell and another;—That the ship *Confederacy* was an American built ship, the property of American subjects, by whom she was sold, in 1795, in the port of London, to Leffingwell and another, also Americans;—That the ship was afterwards loaded in and cleared out, and sailed from London for Madeira from whence she proceeded to the Isle of Bourbon, and thence to Mauritius, at which places the greater part of the cargo was disposed of;—that from Mauritius she proceeded to Bombay, where she arrived in June, 1796;—that during all this time, she was commanded by S. Jencks, a citizen of the United States of America, “and was furnished with and had on board a proper passport, duly made out and granted according to the

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form annexed to the treaty of commerce" between France and the United States of America :—That during the time the ship was at Bombay, the remainder of the cargo was landed and disposed of, and the captain obtained from the governor in council a licence to load on board the *Confederacy* a cargo of cotton, and to proceed with the same for sale from thence to Canton, in China :—That having taken on board such a cargo, the captain sailed in the ship for Canton, and in his passage thither touched at the island of Puloopinang,† where he took on board a quantity of tin for ballast, of the value of 3,500*l.* and arrived at Canton in October, 1796, where her cargo was sold and disposed of, and the goods mentioned in * the first count in the declaration (the property of Leffingwell and another) were at Canton loaded and put on board to be carried from thence to Hamburgh : That the proceeds of the cargo from Bombay to China were employed in the purchase of part of the cargo from China to Europe : That the voyage from London to Canton and the voyage from Canton to Europe were two voyages : That the ship sailed from Canton towards Hamburgh with the goods on board in January, 1797, and whilst she was on her voyage was captured by a French ship of war and carried into Nantes ; where proceedings being instituted before the tribunal for determining the questions of prize, the ship and cargo were condemned as prize. [The sentence of condemnation was set forth at length in the special verdict ; but it is omitted here, because this Court considered that the condemnation proceeded entirely on the ground that the ship had violated some of the French ordinances.] It then stated that in the treaty between this country and America, referred to in the stat. 37 Geo. III. c. 97, the following article is contained :—" His Majesty consents that the vessels belonging to the citizens of the United States of America shall be admitted and hospitably received in all the sea ports and harbours of the British territories in the East Indies ; and that the citizens of the said United States may freely carry on a trade between the said territories and the said United States in all articles of which the importation or exportation respectively to or from the said territories shall not be entirely prohibited ; provided only that it shall not be lawful for them in any time of war be-

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tween the British Government and any other power or state whatever to export from the said territories without the special permission of the British Government there, any military or naval stores or rice. The citizens of the United States shall pay for their vessels when admitted into the said ports no other or higher tonnage duty than shall be payable on British vessels when admitted into the ports of the United States; and they shall pay no other or higher duties or charges on the importation or exportation of the cargoes of the said vessels than shall be payable on the same articles when imported or exported in British vessels: but it is expressly agreed that 'the vessels of the United States shall not carry any of the articles exported by them from the said British territories to any port or place, except to some port or place in America where the same shall be unladen; and such regulations shall be adopted by both parties as shall from time to time be found necessary to enforce the due and faithful observance of this stipulation. It is also understood that *the permission granted by this article is not to extend to allow the vessels of the United States to carry on any part of the coasting trade of the British territories; but vessels going with their original cargoes or part thereof from one port of discharge to another are not to be considered as carrying on the coasting trade; neither is this article to be construed to allow the citizens of the said states to settle or reside within the said territories, or to go into the interior parts thereof without the permission of the British Government established there. And if any transgression shall be attempted against the regulations of the British Government in this respect, the observance of the same shall and may be enforced against the citizens of America in the same manner as against British subjects or others transgressing the same rule. And the citizens of the United States, whenever they arrive in any port or harbour in the said territories, or if they should be permitted in manner aforesaid to go to any other place therein, shall always be subject to the laws, government, and jurisdiction of whatever nature established in such harbour, port, or place, according as the same may be. The citizens of the United States may also touch for refreshment at the island of St. Helena, but subject in all respects to such regulations as the British Government may from time to time

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establish there." The verdict concluded with praying the advice of the Court, assessing the damages separately on the two counts, in case the Court should be of opinion that the plaintiffs were entitled to recover upon either of them.

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This case had been before the Court several times before, on a motion for a new trial, and afterwards on a special verdict, after the former special verdict had been argued a *venire de novo* was awarded, because damages were given generally on both the counts in the declaration; and the Court intimated an opinion that though the plaintiffs might recover on one count, they were not entitled to recover on the other. Accordingly the case went to another jury, when the present verdict was found, differing from the former in several particulars, but principally in these: That in this verdict the damages were separately assessed on the different counts, and it was now stated that the voyage from London to Canton, and that from Canton to Europe, were two distinct voyages. This verdict was now argued by *Law* for the plaintiffs, and *Adam* for the defendant.

The second count, on the policy on the ship, was now abandoned by the plaintiffs' counsel, on this ground, that as the policy on the ship attached "at and from Canton," including the period of time when the cotton taken in at Bombay (an illegal cargo *being in contravention of the treaty between this country and America) was still on board; and as the immediate voyage and adventure insured could not be divided into parts, the whole must be deemed an illegal adventure.

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But on the first policy, that respecting the goods, several questions were made. It was objected, on the part of the defendant; that the plaintiffs could not recover on this count,—1st, Because the goods insured were purchased with the proceeds of an illegal cargo, that procured at Bombay (it being admitted that the governor's licence to purchase it was illegal); and that such an adventure was contaminated by such antecedent illegal traffic. 2ndly, Because the voyage from Bombay to Canton was only a part of a larger voyage, out and home from London to Canton, and from Canton to Europe; and that as the ship, in the course of the voyage, traded at Bombay, contrary to the treaty between this country and the United States of

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America, by not returning directly† from Bombay to America, the whole voyage was illegal. 3dly, Because the ship was seizable for a violation of the navigation act in a prior part of the voyage, from Bombay to Canton; and consequently that the goods insured were not put on board a proper ship, such an one as the assured impliedly undertook to provide; and that the right of seizure continued at least during the time that the ship was on the high seas, and until her return home. 4thly, Because the sentence of condemnation by the tribunal at Nantes negatived the ship being an American.

On the part of the plaintiffs it was answered, 1st, That it was perfectly immaterial in this case to consider how the funds were acquired with which the cargo insured was purchased; it being sufficient for the purpose of this question that the cargo, when bought, was meant to be conveyed in the course of a legal voyage. 2ndly, That the fact on which this objection was founded, was negatived by the verdict; where it was expressly stated, That these were two distinct voyages; and consequently that the homeward voyage from Canton to Europe could not be affected by any illegality in the voyage outwards. 3dly, That the circumstance of the ship having been liable to seizure for an act done before the commencement of the voyage insured, could not affect this policy; for that the ship could only be seized *flagrante delicto*, during the same voyage, otherwise she could never afterwards be legally insured; and that the seizure *of the ship for an antecedent cause of forfeiture was not within the scope of the indemnity of the underwriters, as they are only liable for risks incurred during the voyage insured. *Lockyer v. Offley*, 1 T. R. 252.‡ 4thly, That it appeared by the concluding part of the sentence, that the ship and cargo were condemned for having violated some of the French ordinances, which were not obligatory on the Americans, and consequently that this sentence did not negative the ship being an American. *Pollard v. Bell*, 8 T. R. 494.§

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LORD KENYON, Ch. J. :

Although this case has only been argued once on this special

† Vid. *Wilson v. Maryat*, 8 T. R. 31. ‡ 1 B. R. 194. § P. 404, ante.

verdict, yet as the question has been so frequently canvassed of late, we have had an opportunity of considering it; and as the parties may expect not to be kept longer in suspense, we will dispose of the case now. It is now admitted by the counsel for the plaintiffs, and very properly so, that the policy on the ship must be abandoned, because during part of the time that the parties intended that the policy should attach, namely, while the ship was at Canton, there was something illegal in the transaction; therefore, we are now delivered from all consideration respecting that part of the case.

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With regard to the other part of the plaintiff's claim on the policy on the goods, the arguments urged by the defendant's counsel have not convinced me that this contract is illegal, because the goods insured were procured with the proceeds of a former illegal cargo. If this objection were well founded, it would go to an alarming extent. In deciding on a claim made on a policy of insurance, it would be necessary to examine and scrutinize the past conduct of the assured, in order to see whether or not, by their former transactions in life, they had illegally acquired the funds with which the particular goods insured were purchased: but we cannot enter into considerations of that kind; we must confine ourselves to the immediate transaction before us; and whatever my former opinion may have been on the facts of this case, the jury have relieved us from one consideration, by finding expressly as a fact that these were not two connected parts of one voyage; but that the voyage homewards from Canton was a separate and distinct voyage from that to Canton: the homeward voyage therefore cannot be affected by the former outward voyage. The case of *Pollard v. Bell*, that has been alluded to in the argument, was decided by us after great consideration; and though that case could not be reconsidered by a court of error, as the facts did not appear on the record, *fortunately for ourselves as well as for the parties here, there is a mode by which our judgment in this case, if erroneous, may be corrected; and the defendant, if he be dissatisfied with the grounds of our decision in *Pollard v. Bell*, will have an opportunity of canvassing that decision by bringing a writ of error in this case: but after the greatest attention that I have been able

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to bestow on the subject, I adhere to the opinion that we gave in that case ; and that decision is directly in point to the present case. It was there established as a proposition, That the judgments of the Courts of Admiralty are to proceed on the known *jus gentium*, or on the treaties between particular states : that such treaties do not alter the *jus gentium* with respect to the rest of the world, but as between those particular states they are considered as engrafted on the *jus gentium* ; and that one state has no authority by any ordinance of its own to vary the general law of nations as to other states. Then what is the ground on which this sentence of condemnation proceeded ? Unquestionably, a violation of the French ordinances only. At first I was struck with one of the considerations mentioned in the sentence, respecting the passport : “ Considering that so far from derogating from this general regulation for all nations in favour of the Anglo-Americans, by the treaty of the 6th of February, 1778, this treaty implicitly subjects them to it by the 25th and 27th articles, which oblige them to conform to the model of the passport annexed to the treaty.” But that was conformed to ; for it is expressly found by the special verdict, that “ the ship was furnished with and had on board a proper passport, duly made out and granted according to the form annexed to the treaty of commerce between France and The United States of America : ” —and after attentively considering the whole of the sentence of condemnation, it appears to me, beyond all controversy, that the ground on which it proceeded is that which is mentioned in the concluding part of the sentence : “ The tribunal, in conformity to the above mentioned laws† and regulations, and particularly of the decree of the executive Directory of the 12th Ventose, 5th year, adjudges and declares the validity of the prize of the foreign ship the *Confederacy*, Captain Scott Jencks, captured by the privateer *Duguai Trouin*, Captain Dutache, as also of all her appurtenances and dependencies, tackle, apparel, and utensils ; adjudges and declares likewise the validity of the prize of all the goods and effects composing *the lading or cargo of the said ship the *Confederacy*, in default of Captain Jencks and the

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† Which, by a reference to a to be those of 3d Brumaire, 4th former part of the sentence, appear year ; and 26 July, 1778.

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supercargo Pierpont being regular in their list of crew and their dispatches." Now that is neither required by the law of nations nor by the treaty between France and the United States of America ; and it is found by the verdict, that all the requisites of that treaty were complied with. The foreign Court thought that they had a right to impose something on an independent nation beyond what is required by the law of nations, or by the treaty entered into by that independent nation ; but that certainly is not obligatory on such nation ; therefore, in conformity with the decision in the case of *Pollard v. Bell*,† I think I am bound to conclude that the plaintiffs are entitled to recover on the policy of insurance on the cargo ; and that on the other count, on the policy of the ship, the judgment must be for the defendant.

GROSE, J. :

The plaintiffs have now given up their claim on the policy respecting the ship ; and the defendant has attempted to impeach the policy on the cargo, first, On the ground that the goods insured were purchased with the proceeds of a former illicit cargo ; and, secondly, On the ground that the foreign sentence is conclusive as to the fact that this was not an American ship. With regard to the first point, arguments *ab inconvenienti* are alone sufficient to determine it. If we were to decide that such a cargo could not be insured, it would be difficult to say to what consequences it would lead ; the principle of that decision would equally extend to the second, nay, to the hundredth cargo purchased afterwards, and to the ship itself, so that such a ship never could afterwards become the subject of a legal insurance, even in the hands of subsequent purchasers. I know of no principle of law to warrant such a doctrine ; and I think that we ought not to establish so inconvenient and absurd a rule. Then it remains to be considered, Whether or not the case of *Pollard v. Bell* † were properly decided ? and if it were, Whether it ought not to govern the present case ? I have heard no arguments to induce me to think that we judged erroneously in determining that case ; and it appears to me to be a direct authority for the present. Though the foreign sentence is drawn in an inaccurate and rather a confused manner, I think that the

† P. 404, *ante*.

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condemnation proceeded solely on the ground that the ship in question had violated some of the French ordinances; and not because she had infringed the law of nations, or the particular treaties that subsisted between France and America; therefore, without repeating the reasons given in the case of *Pollard v. * Bell*, I think that the decision must govern us in determining this case.

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LAWRENCE, J. :

It has been contended on the part of the defendant that the plaintiffs cannot recover on the policy on the goods, which are the subject of this insurance, because they were bought with the proceeds of an illegal cargo, and because the ship on board which the goods in question were put, having violated the treaty by trading from Bombay to Canton, was liable to be seized; and further because the ground of the sentence of condemnation was not for having violated any of the French ordinances merely, but for an infraction of the treaty between France and America; the propriety of which sentence we cannot examine. With regard to the first of these objections, In such a case as the present we cannot enquire into the means by which the merchant gains the money that is afterwards laid out in the purchase of goods: if the money were obtained by robbery on the highway, and invested in the purchase of a cargo, I do not know why that cargo may not be legally insured. In order to render the insurance illegal, the illegality should exist during the course of the voyage insured. Nor do I think that the next objection, that the plaintiffs cannot recover because the ship was liable to seizure, is well founded. Here the illegality commenced by the captain taking on board a cargo at Bombay, in order to carry it to Canton for sale. But the doctrine relied upon by the defendant is perfectly new: That the assured cannot recover on the policy against the underwriters, because a ship in a prior voyage had been guilty of some transgression for which she was liable to be seized! That is not a risk within the policy; if the ship had been seized for this cause during the voyage insured, the underwriters would not have been liable; they are only liable for risks in the course of the voyage insured. Then the only remaining question is,

Whether or not it were decided by the foreign sentence that the ship was not an American? It was determined in the case of *Pollard v. Bell*, that a sentence of condemnation for violating the ordinances of one nation, not adopted by the treaty between that nation and the country of which the owner of the property insured is a subject, will not prevent the assured recovering on the policy, on the ground that such sentence negatives the warranty of neutrality. But the attempt on the part of the defendant here is not so much to dispute the authority of that case as its application to the case before us. However, I am of opinion that, on the whole, we must consider *that the foundation of this sentence of condemnation was the violation of French ordinances only, and consequently that the case of *Pollard v. Bell* † is a direct authority for the present.

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LE BLANC, J. :

It is insisted that the plaintiffs are not entitled to recover for the goods insured, first, On the ground that the homeward cargo from Canton to Europe was in part purchased with the proceeds of the goods sold at Canton ; and, secondly, On the ground that the ship was liable to seizure on her homeward bound voyage, because she had before been trading illegally. But I cannot assent to the doctrine, that we must inquire how the money was procured with which the cargo insured was purchased, in order to see whether or not the underwriters be liable on their contract of insurance. According to that doctrine, it would be necessary to trace the money through the various channels in which it may have passed before it got into the pocket of the merchant, before we could decide whether or not a subsequent contract of insurance on goods purchased with such money were legal. But such a proposition cannot be supported in a court of law. With regard to the other ground of defence, I do not think that the right of the assured to recover on this policy is impeached, because the ship in part of another voyage, which is found by the special verdict to be a distinct voyage from the one in question, was engaged in an illegal traffic. If the ship had been seized in the course of the former illegal voyage, the underwriters might have said that they had not indemnified the owners against such

† P. 404, *ante*.

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a risk: but no such illegality did exist during any part of this voyage. Then it only remains to be considered whether or not the warranty that the ship was an American is negatived by the sentence of condemnation. We must look to the concluding part of this sentence, to see the grounds on which the foreign court professed to decide. If that determination had been founded either on the law of nations or on the treaty subsisting between France and America, we could not have inquired whether or not that Court had formed a right decision. But if we see that that Court condemned the ship and cargo either on the law of nations or on the treaty between America and France, then we are bound to declare that such a sentence is not conclusive on the parties to this action: it does not affect the question respecting the warranty of neutrality; and I think that the sentence is founded simply on an infringement of the French ordinances, which are particularly pointed out in the sentence, and not on any breach of the law of nations, or of *the treaty between France and America. For these reasons, therefore, I concur in the opinion given by the rest of the Court, That the plaintiffs are entitled to recover on the policy on the goods.

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Per CURIAM :

*Judgment for the plaintiffs on the first count, and
for the defendant on the second.*

1800.
May 26.

THE KING v. G. RING.

(8 T. R. 585—586.)

[585]

A subpoena may be issued from the Crown Office, requiring a witness to attend at the assizes in the country to give evidence in support of an intended prosecution for a felony; and this Court will grant an attachment against him for not attending in obedience to the subpoena.

Two persons, of the names of Everland and Davis, having been committed to Salisbury gaol in February last, on a charge of felony, the prosecutor, on the 5th of March last, procured a subpoena, on the part of the Crown from the Crown-Office, requiring Ring, a material witness, to appear at the then next assizes at Salisbury to give evidence. Ring not appearing

according to the subpœna, the grand jury for the county of Wilts threw out the bill against Everland and Davis, who were thereupon discharged out of custody. At the beginning of this term,

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Jekyll moved, on the part of the prosecutor, That an attachment might issue against Ring, for not obeying the writ of subpœna. On an affidavit stating the above facts, and also stating that Ring had been personally served with the subpœna, and that he was a material witness in support of the prosecution.

The Court then doubted whether, as there was no proceeding in this Court, the subpœna were properly issued from the Crown-Office; but granted a rule to shew cause, desiring that the rule might not afterwards be made absolute without their being apprized of it; and recommending an enquiry to be made into the practice on this point.

Jekyll now moved to make his rule absolute; saying, That there was no opposition to it; and that on enquiry at the Crown-Office, he had found that a similar attachment had been granted against one Shilcox, in 1793.†

*LORD KENYON, Ch. J. :

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We also have directed enquiries to be made on this subject and we find that this application is warranted by precedents.

Per CURIAM :

Rule absolute.

† In Trinity Vacation, 1793, a writ of subpœna issued out of this court, directed to T. Shilcox and others, requiring them to appear at the Old Bailey Sessions in October, and give evidence against John Swindon for felony. In Michaelmas Term, 1793, Shilcox not having appeared to give evidence in obedience to the subpœna, this Court on the motion of *Garrow* granted an attachment against him for a contempt, in not paying obedi-

ence to the subpœna. On the 17th of February, 1794, Shilcox was taken into custody upon this attachment in Warwickshire, and removed from thence to London; and having, in the April Sessions, 1794, given evidence against Swindon, at the Old Bailey, who was convicted and executed, this Court in Hilary Term, 1795, ordered Shilcox to be discharged out of custody from the attachment.

K. B. TRINITY TERM.

1800.
June 1st.

THE MAYOR, &c., OF SOUTHAMPTON, v. GRAVES.

(8 T. R. 590—595.)

[590]

Pending an action by a corporation for tolls, the Court will not grant leave to inspect the corporation muniments on the application of the defendant, a stranger to the corporation.

THE corporation of Southampton brought an action against the defendant for certain tolls for wharfage on landing goods ; pending which the defendant, who was not a corporator, obtained a rule in the last term calling on the plaintiffs to shew cause why he should not be at liberty to inspect all the corporation-books, papers, writings, and orders of council touching the matter in question, and take copies thereof, paying a reasonable sum for the same.

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Erskine now shewed cause against the rule, and admitted that in very modern times a practice had obtained for the Court to grant rules of this sort,† but contended that the practice had *crept in without sufficient consideration, and was not founded in principle or supported by former precedents. The reason assigned for granting such an inspection, namely, that it would be obtained of course by filing a bill in Chancery for a disclosure, is not founded in fact ; for that Court will exercise its discretion upon every such application, and grant or refuse the inspection according to the circumstances of the particular case. But even if it were true, it would not follow that a court of law would grant the same disclosure upon a summary application, because it might be obtained from the Court of Chancery upon a bill filed ; for that would be to confound the jurisdiction of the court of law and equity. In 2 Ves. 620, upon an application for an inspection of corporation books and papers of the city of Exeter, pending an action brought by the corporation against

† *Mayor of Lynn v. Denton*, 1 T. R. 689, 1 R. R. 359 ; *The Corporation of Barnstaple v. Lathey*, 3 T. R. 303 ; *The Mayor, &c. of London v. The Mayor, &c. of Lynn*, 1 H. Bl. 211 ; *Vide Rex v. Babb*, 3 T. R. 579.

certain traders for petty customs, Lord HARDWICKE said, "It has been refused to inspect at law into corporation-books, and rightly; because courts of law will not give that liberty to any one who has not some right or claim to it, being a member of the corporation. So as to a manor; in the question between lord and tenant, a court of law will give liberty to inspect books of the Court Rolls, but not in a question between lords of different manors; yet on a bill in this Court for a discovery, this Court will grant it." A corporation having the same rights of property as an individual, there seems no ground for making a distinction between them in this respect; and as no such rule would be granted to inspect the muniments of a private person claiming tolls, neither ought it to be granted against a corporation upon a similar claim.

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Gibbs and *Burrough*, in support of the rule, relied upon the modern practice established in the cases alluded to, which could not be distinguished from the present. They said that the practice was established to save the expense of applying to the Court of Chancery where such inspection would certainly be granted:— that this appeared even from the case in *Vesey*, although it was there stated that the practice of the Courts of Law was then different. That if it were reasonable for the Court of Chancery to make a distinction between the case of a public body, such as a corporation, and that of a private person, the same reason would warrant the practice which has of late years been adopted by the Courts of Law.

LORD KENYON, Ch. J.:

As all the determinations on this subject prior to the late decisions that have been relied on by the defendant are against this application, I do not think it is too *late even now to review those late decisions, and see whether or not they are supported by principle. It has been contended on behalf of the defendant, that an inspection of books, papers, and writings is to be granted in cases where a corporation is a party to an action; but is the rule to extend to cases where a sole corporation is a party to an action? but is the rule to extend to cases where a sole corpora-

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tion, a bishop for instance, sues; or is to be confined to cases where an aggregate corporation is a party? Corporations, like individuals, have their rights and estates; they may (except where they are restrained by the statutes of mortmain) acquire landed property: but according to the doctrine now relied upon by the defendant in every case where a corporation are parties to a suit, an inspection of their writings is to be granted of course. Where indeed the dispute is between different corporators, there an inspection of the writings belonging to the corporation may be granted, because each party has a right to see them: but I cannot conceive why an inspection of the muniments of a corporation should be granted when a similar inspection would be denied if the suit were between private persons only. Great inconvenience and injustice would ensue from establishing the rule insisted upon by the defendant. A court of equity knows its own province; it will examine into cases of this kind when the application is made, and adapt its rules to the individual case in the manner best calculated to attain the ends of justice. But if this Court is to grant an inspection of title-deeds it must be a general rule framed to embrace all cases. Now the inconvenience of this may be illustrated by this example;—Suppose an application of this kind were granted against a purchaser of an estate for a valuable consideration without notice of some prior estate, the defect is disclosed to the adverse party, who gets possession of the prior deeds, and then defeats such purchaser at law. If an application be made to a court of equity to compel a party to produce his muniments, he may answer that he is not bound to produce them, because he is a purchaser for a valuable consideration without notice: that is a good plea to a bill for a discovery. Then suppose that a corporation, instead of an individual, purchase an estate for a valuable consideration, not knowing that there is an outstanding legal estate, they would be protected in equity; but according to the defendant's rule the adverse party would have a right, as a matter of course, to pry into and examine the defect of the title of the corporation. I have no doubt but that the late cases, on which the defendant has relied, were decided with the most *honourable intention, but I think that when they were decided, the whole merits of the

question were not embraced. A similar mistake was, I think, made in this Court some few years before I sat here, on another question; where it was decided that an action at law might be maintained for a legacy,† partly on the ground that the plaintiff would have recovered it as of course in a court of equity. On its being mentioned to me by the late Mr. Justice BULLER, I took the liberty of asking him whether or not he was sure that the Court had taken a view of the whole question before they decided it, reminding him that it is a constant rule in courts of equity, when a husband files a bill for a legacy given to the wife, that (if I may use the expression) they stop it *in transitu* if there be no provision for the wife; whereas if a legacy could be recovered in an action at law, there would be no provision made for the wife and family as the husband would at once take the legacy: that learned Judge, whose legal knowledge was universally allowed, immediately admitted the force of the observation. There was indeed a case in Cromwell's time, in which an action at law for a legacy was maintained;‡ but the reason given for that decision was that there would be a failure of justice§ if courts of law did not take cognizance of the question, the Spiritual Courts not being then open: but as soon as those Courts resumed their functions, suits of this kind returned into their proper channel; and since I have sat in this place, it has been determined that a legacy cannot be recovered in a court of law.||

With regard to this particular question, Lord HARDWICKE, who perfectly well understood the boundaries between the courts of law and equity, expressly said that courts of law

† *Hawkes v. Saunders*, Cowp. 289.

‡ Vid. Sty. 55.

§ In *Nicholson v. Shirman*, 1 Sid. 46. "Fuit resolve per totam curiam que action sur le case ne gist pur un legacy, mes les parties doivent suer per ceo in le spiritual Court a que le jurisdiction de tous testamentary causes properment appent. Et coment tiel actions ont estre allow de tardif temps, encore ceo ne fuit forsque propter necessitatem a preventer un fayler de justice quant la

ne fueront spiritual Courts; mes ore come L'Evesques sont restore a lour terre issint doivent ils estre restore a lour proper jurisdiction; car cest court, que est le governor et director de tous inferior courts, et que ad use pur correct eux quant ils intromit ove causes hors de lour jurisdictions ne voet pas robb eux pur increaser les causes."

|| *Decks & Ux. v. Strutt*, 5 T. R. 690.

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cannot grant such an inspection as is prayed for in this case, though a court of equity can : but then a court of equity will only do it in certain cases, after examining into the circumstances of the case. I cannot therefore acquiesce in the late decisions alluded to. I cannot make a distinction in this respect between a corporation aggregate and a corporation sole, or between *a corporation sole and a private person suing in his individual capacity. I think that we should establish an inconvenient and an unjust rule, and should act against principle, and against all the authorities (except the late decisions which proceeded on a mistake) if we were to grant the present application ; and therefore this rule must be discharged.

GROSE, J. :

When I first came into this Court, it was understood to be the constant practice to grant rules of this kind as matters of course : but my Lord Chief Justice has clearly shewn that the reason given for it is not true ; the party applying to a court of equity has not the benefit of his application as a matter of course ; that Court will examine all the circumstances of the case, and exercise its discretion accordingly. Such an application as this was made to the Court of Common Pleas in a case reported in Wilson† where Lord Ch. J. DE GREY seemed to be of opinion that the party applying had no right to inspect the corporation books ;—and considering the case on principle, I do not see any reason why such an indulgence should be allowed in the case of a corporation, when it would be refused if the action were brought by an individual.

LAWRENCE, J. :

In the case of the *Corporation of Barnstable v. Lathey*, I made the application to inspect the corporation-books, on the authority of the *Mayor of Lynn v. Denton* ; † and at that time Lord KENYON intimated a doubt upon the question ; and though the rule was at first granted, I believe that ultimately the party had not the benefit of it.§ The foundation of the decision in the case of the

† *Hodges v. Atkis*, 3 Wils. 398.

§ Vid. 3 T. R. 305, n. a.

‡ 1 R. R. 359, 1 T. R. 689.

Mayor of Lynn v. Denton was, that liberty to inspect the corporation books and papers would be granted in equity as a matter of course, and that it would only create expense to the parties to send them into that court. But on looking into the authorities it does not appear that a court of equity will grant an inspection as a matter of course. In the case cited from *Vesey*, Lord HARDWICKE thought that courts of law ought not to grant an inspection of the corporation books in such a case as this; and though he said that in a court of equity such an inspection would be granted, I do not understand that it would be granted in all cases as of course, but only under certain circumstances. In the case in 3 *Wilson*, Lord Ch. J. DE GREY thought such an application as the present an extraordinary one; he said, "Do you lay it down in general that a stranger has a right to inspect the books of a corporation? How has a stranger to *a corporation more right to inspect their books than the books of a private person? While Lord CAMDEN sat here, there was the like motion, in the like action of trespass, where the defendant justified under the corporation of Ipswich for distraining for a toll for repairing a quay there, and the motion was refused, the plaintiff there being a stranger to the corporation: and I am sure in many cases like the present the motion has been refused." He however declined giving a positive opinion on the point, because the cause was not at issue. Considering therefore the weight that is due to the opinions of Lord HARDWICKE and Lord Ch. J. DE GREY, notwithstanding the practice that has obtained since, I think it is better to recur back to the ancient practice, particularly as the reason given for the late decisions is not a satisfactory one.

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LE BLANC, J.:

I do not see any distinction in this respect between the case of a corporation and that of an individual suing; nor how after this application should be granted we could refuse a similar application in an action brought by an individual.

Per CURIAM :

Rule discharged.

BOLT *v.* STENNETT.

(8 T. R. 606—608.)

1800.

June 20.

[606]

The public have a right to use the cranes erected on public quays. In justifying (in a plea to an action of trespass) the use of a crane in a public wharf, it is sufficient to say that it is "a public open and lawful wharf," without claiming the right by immemorial usage.

THIS was an action of trespass, for breaking and entering an erection of the plaintiff's, called The Crane, on Smart's Quay, in the parish of St. Mary-at-Hill, in the ward of Billingsgate, and continuing in the same for the space of twelve hours. The defendant pleaded, besides the general issue, two special pleas of justification. In the first special plea it was stated that Smart's Quay, on which the crane was erected, was a public, open, and lawful quay within the port and city of London, between London Bridge and Blackwall, for the landing thereon of all customable goods of all merchants importing the same, for a reasonable compensation to be therefore paid by the merchants to the owner of the quay; that the crane, when, &c. so erected for the unloading of goods on the quay out of ships lying near the quay for the purpose of being unladen there, was necessary for that purpose; that from time immemorial the Mayor and Commonalty and citizens of London have had and still have of right, &c. the lading and unloading, by themselves or their deputy, of all goods and merchandizes of all merchants, strangers, &c. imported into the city of London and liberties thereof, and being so entitled by indenture dated December 5th, 1796, they appointed the defendant their deputy to lade and unlade all such goods for seven years, &c. by virtue whereof the defendant, before and at the said time when, &c. became and was entitled as such deputy to have the lading and unloading of such goods; that while the defendant was such deputy, to wit, on, &c. certain customable goods belonging to merchant-*strangers, were imported from parts beyond the seas into the port of London and within the city of London, between Blackwall and London Bridge, at Smart's Quay, being such public open and lawful quay, for the purpose of being

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unladen thereon by the direction of the agents of those merchant strangers, whereby it belonged to the defendant to have the unloading of the said goods and to use the said crane, and to enter the same, so then erected and being necessary for the unloading of the goods; whereupon the defendant entered into the said crane and used the same for the unloading of the said goods and landing the same on the said public open and lawful quay, as it was lawful for him to do, &c. In the second plea of justification it was alleged that Smart's Quay, on which the crane was erected, was an open, public, and lawful quay within the port and city of London, &c. for the landing thereon of all customable goods of all merchants importing the same into the port of London, for a reasonable compensation to be therefore paid by the said merchants to the owner of the quay, and that the said crane so erected for the unloading of goods upon the said quay was necessary for that purpose; that on, &c. certain customable goods belonging to A. B. were imported into the port of London at Smart's Quay, for the purpose of being unladen thereon by the direction of the said A. B., whereupon the defendant as the servant of the said A. B. and by his command, entered into the crane, so being necessary for the unloading of goods upon the said quay, and used the same for the unloading of the said goods, &c. as it was lawful for him to do, &c.

The plaintiff demurred to the two special pleas; and as to the first, assigned for causes of demurrer that it was not alleged in the plea that any compensation was to be paid to the plaintiff for the landing of the said goods on the quay; that it did not appear by that plea that the defendant had any right to land the said goods on the quay, or to enter into or use the crane for the unloading of the said goods, or to continue on the crane or to work it; that it was admitted by the plea that a reasonable compensation was to be paid to the owner of the quay for the landing of the goods, and yet the defendant claimed the landing thereof, which was inconsistent and against law, &c. The causes of demurrer assigned to the second special plea were nearly the same as the former. The defendant joined in demurrer.

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Wood in support of the demurrer, took two objections to the pleas. First, That they did not shew any right in the defendant to enter on the crane in question for the purpose mentioned in the pleas; for that the public have no right to enter on all the *quays in the port of London to lade and unlade their goods; and that if they have any such right it could only exist by immemorial usage or custom, which was not stated in either of the pleas. Secondly, That if the public have a right to use the quay in question for the purpose mentioned in the pleas, it did not appear that the defendant had used it in this instance at a reasonable time. But,

The COURT (stopping *Dampier*, who was to have argued for the defendant) overruled both the objections. With regard to the first, they said that it was not necessary to state in terms in a plea of justification under the general right that this was an immemorial quay; that it was sufficient to claim the right under the general words "a public, open, and lawful quay;" in which respect it was similar to a highway, which may be described "as a public and common King's highway," without alleging it to have been so immemorially; and they referred to what Lord Hale said in his treatise *De Portibus maris*, par. sec. cap. 6.† "If the King or subject have a public wharf, unto which all persons that come to that port must come and unlade or lade their goods as for the purpose, because they are the wharfs only licensed by the queen according to the stat. 1 Eliz. c. 11, or because there is no other wharf in that port, as it may fall out where a port is newly erected,—in that case there cannot be taken arbitrary and excessive duties for crannage, wharfage, pesage, &c. neither can they be enhanced to an immoderate rate, but the duties must be reasonable and moderate, though settled by the King's license or charter. For now the wharf and crane are affected with a public interest, and they cease to be *juris privati* only; as if a man set out a street in new building on his own land, it is now no longer bare private interest, but it is affected with a public interest." From whence it is obvious that Lord Hale considered a public quay to be like a public

† Hargr. Tra. vol. 1, p. 77.

street, common to all the King's subjects. And, as to the second objection, they said that, if true, it should have been new assigned by the plaintiff, or that, if it were an objection to these pleas, it could only be taken advantage of on a special demurrer, assigning this as a cause of demurrer.

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Judgment for the defendant.†

THE KING v. J. RICHARDS AND FIVE OTHERS.

(8 T. R. 634—637.)

1800.
June 28.

[634]

If the commissioners under an inclosure Act set out a private road for the use of the inhabitants of nine parishes, directing the inhabitants of six of those parishes to keep it in repair, no indictment can be supported against the latter for not repairing it, it not concerning the public.

THIS was an indictment against the defendants for not repairing a road. The indictment stated, That by virtue of an Act of Parliament, 31 Geo. III. intituled "An Act for draining and dividing a certain moor or tract of waste land, called King's Sedgmoor, in the county of Somerset," it was enacted that certain commissioners therein named should, before making any allotments of the said moor, set out and appoint such private roads and drove-ways over the same as in the judgment of the said commissioners should be necessary and convenient; and that all private roads and ways so to be set out, should be made

† The same question was lately agitated in the Court of Common Pleas, in an action on the case, brought by this defendant against the plaintiff for wrongfully and injuriously intruding himself into the defendant's office and employment of Packer's Porter, otherwise Alien Porter, by unlading at this quay certain goods belonging to Aliens, of which the defendant by virtue of his office was entitled to have the unlading, and to receive the duties and profits due from the importers for the unlading thereof. On the trial at Guildhall in May, 1799, this defendant obtained a ver-

dict, the late Lord Ch. J. EYRE, who tried the cause, being of opinion that as it was admitted that the merchants had a right to have their goods unladen at the quay in question, as a public quay, they had also by necessary consequence a right to use the cranes erected there, on paying a reasonable satisfaction to the owner; and that the defendant, who by his grant from the city had the privilege of landing the goods, had also, as an incident, a right to use all the accommodations that were provided for the public by the wharfinger for the purpose of land-

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and repaired at the expense of all or any of the persons interested in the said moor, and in such manner as the said commissioners should direct; that certain commissioners under the Act in execution of the powers thereby vested in them, by their award set *out and appointed a certain private road and drove-way in, over, and upon the said moor, to be a private road and drove-way, to be called Henley Drove-way (describing it); that the said commissioners also awarded that the said drove-way should be for the benefit, use, and enjoyment of the several owners, tenants and occupiers for the time being, of all and singular the tenements in the several parishes or hamlets of Highham, Lowham, Aller, Pitney, Long Sutton, Huish Episcopi, Butleigh, Ashcott, and Greinton, in the said county, in respect whereof and of the rights of common severally appurtenant thereto, the divisions and allotments of the said moor were thereby assigned and allotted unto the same parishes or hamlets respectively; that the said commissioners thereby ordered and directed that the said drove-way should for ever thereafter be repaired by the several owners, tenants, and occupiers for the time being of all and singular the tenements in the several parishes or hamlets of Highham, Lowham, Aller, Pitney, Long Sutton, and Huish Episcopi, in respect whereof and of the rights of common severally appurtenant thereto, the divisions and allotments of the moor were thereby assigned and allotted unto the same parishes or hamlets respectively, in equal shares and proportions when and so often as need should be, &c.; by reason whereof the said private road and drove-way became and was a private road and drove-way for the purposes above mentioned, and by virtue of the said Act and of the said award, liable for ever hereafter to be from time to time amended and kept in repair in the manner and by the means aforesaid; that on, &c. the said way, called Henley Drove-way, was ruinous and in decay for want of needful reparation thereof; that J. Richards, late of Highham, and the five other defendants (describing them respectively as of the parishes of Lowham, Aller, Pitney, Long Sutton, and Huish Episcopi) being severally and respectively owners, tenants, and occupiers of certain tenements in the several parishes or hamlets of Highham, Lowham, Aller,

Pitney, Long Sutton, and Huish Episcopi, in respect whereof and of the rights of common severally appurtenant thereto, the divisions and allotments of the said moor were thereby assigned unto the same parishes or hamlets; and being persons interested in the said moor, and by virtue of the premises liable to keep in repair and amend the said drove-way, had not duly repaired and amended the same, &c.

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The defendants pleaded not guilty: and on the trial at the last assizes at Bridgewater, before Mr. Justice Grose, the jury found a special verdict, in substance as follows: "That the *commissioners named in the said Act, by their award dated the 22nd of October, 1795, set out and appointed the said private road and drove-way as described in the indictment, but it was set out for the accommodation of the particular allotments; that the commissioners directed that it should be for the benefit, use, and enjoyment of the several owners, &c. of the tenements of the nine parishes or hamlets mentioned in the indictment, &c.; and that it should be repaired by the several owners, &c. of the tenements in the six parishes or hamlets mentioned in the indictment, &c. That the said road on &c. was ruinous and out of repair: That the six defendants are severally and respectively owners, tenants, and occupiers of certain tenements in the said several parishes or hamlets of Highham, Lowham, Aller, Pitney, Long Sutton and Huish Episcopi; in respect whereof and of the rights of common severally appurtenant thereto, the divisions and allotments of the said moor were by the said award assigned and allotted unto the same parishes or hamlets respectively, and persons interested in the said moor: That the defendants had not repaired the said drove-way: That there are 500 tenements in the said several parishes or hamlets of Highham, Lowham, Aller, Pitney, Long Sutton, Huish Episcopi, Butleigh, Ashcott, and Greinton, of which the owners, tenants, and occupiers are entitled to the benefit, use, and enjoyment of the said drove-way, under the said award: That there are 350 tenements in the said several parishes or hamlets of Highham, Lowham, Aller, Pitney, Long Sutton, and Huish Episcopi, in respect whereof and of the rights of common severally appurtenant thereto, certain divisions and allotments of the said moor were by the award assigned unto the

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When this case was called on in the paper for argument, the Court asked the prosecutor's counsel on what ground it could be contended that this was an indictable offence, the road in question being only a private road.

Praed, for the prosecutor, answered, That this, though a private road, was set out by virtue of a public Act of Parliament, under which the defendants were directed to repair it ; that consequently the not repairing was a disobedience of a public statute, and therefore the subject of an indictment. That this might be considered to a certain degree as concerning the public ; that even " a private Act of Parliament may be given in evidence without comparing it with the record, if it concern a whole county, as the Act of Bedford Levels," 12 Mod. 216 ; and that there was no other remedy than the present, because it appeared by the special verdict that there were no less than 250 persons who were liable to the repair of this road ; and that the difficulty of suing so many persons together was almost insuperable.

But the Court interposed, and said that, however convenient

† Peddle Gate and Henley Corner are the two termini of the drove-way mentioned in the indictment.

it might be that the defendants should be indicted, there was no legal ground on which this indictment could be supported: that the known rule was, That those matters only that concerned the public were the subject of an indictment. That the road in question, being described to be a private road, did not concern the public, nor was of a public nature, but merely concerned the individuals who had a right to use it. That the question was not varied by the circumstance that many individuals were liable to repair, or that many others were entitled to the benefit of it; that each party injured might bring his action against those on whom the duty was thrown. That the circumstance of this road having been set out under a public Act of Parliament, did not make the non-repair of it an indictable offence; that many public Acts are passed which regulate private rights; but that it never was conceived that an indictment lay on that account for an infringement of such rights. That here the Act was passed for a private purpose, that of dividing and allotting the estates of certain individuals. That even if it were true that there was no remedy by action, the consequence would not follow that an indictment could be supported; but that in truth the parties injured had another legal remedy.

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Judgment for the defendants.

Newbolt was to have argued for the defendants.

DOE, ON THE DEMISE OF FELDON, *v.* ROE.

(8 T. R. 645—647.)

1800.
July 2.

Proceedings in ejectment stayed, till the costs of a former ejectment, brought by the lessor of the plaintiff against the defendant's father on the same title, were paid.

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TOPPING, on a former day, obtained a rule, calling on the plaintiff to shew cause why the proceedings should not be stayed till the costs of a former ejectment, brought by the lessor of the plaintiff's father against the father of the real defendant in this case, upon the same title were paid.

This was moved on an affidavit, stating, That about the year

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1772, J. Feldon, the father of the present lessor of the plaintiff, brought an ejectment against the defendant's father, to recover the same premises, in which the latter obtained a verdict; but the costs were never paid. That the present defendant derives title through his father, from one R. Bloxridge, the father's brother, who held the premises as devisee of Cath. Winter and J. Feldon, claimed on account of a supposed incapacity of the said C. Winter to make a will. That the defendant *believes, that the present lessor of the plaintiff claims under the very same title which was set up by his father.

And he cited the two following MS. cases, the latter of which is also shortly reported in Hullock on Costs, 452, "*Fairclaim v. Thrustout*, Easter, 24 Geo. III. B. R. *Couper* obtained a rule to shew cause why proceedings in this ejectment should not be stayed till the costs of a former ejectment were paid. *Dayrell* shewed for cause, that this appeared to be a different title, the former ejectment having been, on the demise of one person, and this on the demise of the same person, and two others jointly; and he cited *Moor* on the demise of *Newman v. James*, Trin. 33 & 34 Geo. II. where a rule of this sort was discharged, it appearing not to be on the same demise. The Court said, It was not sufficient that the demise was different; the title must be different. Here it might or might not be so; for the new lessors might be trustees. The Court then gave *Mr. Dayrell* time to get an affidavit that the title was different."—"Doe ex dem. *Lawson* and others v. *Law*, Widow, Hil. 25 Geo. III. B. R. *Law* shewed cause against a rule to stay proceedings in this ejectment till the costs of a former ejectment were paid. He produced an affidavit, to shew that this ejectment was brought by different persons, though claiming as heirs to the same estate which had been the subject of the former ejectment, but not claiming strictly by the same title. He contended, therefore, that they were not liable for the costs of the former ejectment. The former ejectment was brought long ago; and it would be giving this personal remedy for costs a greater effect than a judgment. In Comb. 106 & 110, Ld. Ch. J. HOLT and the Court said, It must be an ejectment brought by the same persons. He offered, however, to give security for payment of the costs, if the

plaintiffs did not recover. He cited also Str. 1152. Lord MANSFIELD said, That the Court had arrived by degrees at this practice. It was adopted to prevent the hardship of frequent ejectments on the same title; and was the more reasonable as, in real actions, all representatives of the party were concluded for ever from setting up the same title. *Lee and Topping*, in support of the rule, said, It had been resolved lately in several cases, that before a man can be let in to try a second ejectment on the same title, he must pay the costs of the former. If changing the name would vary the question, nothing would be more easy than to evade the rule. They cited the case of *Fairclaim v. Thrustout* (*supra* MSS.) *and observed, That there was no affidavit here to shew that the title is different from that set up by Charles Chadwick.—Lord MANSFIELD, Ch. J.—It is admitted that the plaintiff derives his title through Charles Chadwick. I think it a very beneficial rule; and that the Court are bound to extend it as cases arise. They do not say that you shall not try the question again; but you must first pay the costs of the former ejectment. This is the same title. *Rule absolute.*”

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Milles now shewed cause against the rule: and said, that this was an attempt to carry the practice which had prevailed in these cases further than any case had gone, with the exception of that of *Doe v. Law*, cited. That the lessor of the plaintiff ought not to be bound by the act of his father, from whom he had no assets by descent; and of whom he was not the executor. In the case of *Doe d. The Duchess of Hamilton v. Hatherley*,† the Court granted a similar application against the Duchess, because she had been joined with her husband in the first ejectment, and had proceeded in the cause after his death. In *Tredway v. Harbeck*,‡ the Court were divided on such an application, Lord Holt denying it, because the second ejectment was brought by a different party from the first, and because they could not take notice that it was upon the same title; though it was agreed, that the same lessor, making a new lessee in the second action, should not thereby avoid the payment of the costs of the first; and

† 2 Str. 1152.

‡ Comb. 106.

DOE the same difference prevailed in a subsequent case of *Dence v.*
v. *Doble* † for the same reason. It will be a very uncertain and
ROE. inconvenient rule; as its application must depend on ascertaining
whether or not the lessor in the second ejectment proceeds on
the same title as the lessor in the first.

LORD KENYON, Ch. J. :

The case cited is directly in point to support the present application; and a cogent reason is there given, that ejectments were introduced in lieu of real actions, in which all the representatives of the party to the first suit would have been concluded for ever. Therefore, we should not suffer this fictitious remedy, which was introduced in lieu of the other, to press unnecessarily hard upon the parties.

Per CURIAM :

Rule absolute.

† Comb. 110.

K. B. MICHAELMAS TERM.

SWEET AND ANOTHER, ASSIGNEES OF GARD, A
BANKRUPT, *v.* PYM.

(1 East, 4—6.)

1800.
Nov. 10.

[4]

An agent who has a lien on goods in his possession, if he afterwards deliver them to a ship carrier to be conveyed on account and at the risk of his principal, though unknown to the carrier, cannot recover his lien by stopping the goods *in transitu*, and procuring them to be re-delivered to him by virtue of a bill of lading signed by the carrier in the course of his voyage.

In trover for certain bales of cloth the facts appeared to be these. The bankrupt, a clothier residing in London, before his bankruptcy employed the defendant, a fuller residing in Exeter, in his business; and at the time of the transaction aftermentioned the bankrupt was indebted to the defendant upon the general balance of accounts in more money than the value of the goods in question: and by the custom of the trade at Exeter the defendant had a lien for his general balance. The cloths for which the action was brought had been sent by Gard before his bankruptcy to the defendant to be fulled as usual: and after they were finished the defendant, in consequence of prior orders from Gard, shipped them on board a certain vessel at Exeter to be forwarded to him in London, and sent the invoice to Gard. No bill of lading was signed by the captain at the time of the shipment: but soon after the vessel sailed Pym, hearing of Gard's bankruptcy, followed and overtook the captain off Deal in his passage to London, and there procured him to sign a bill of lading to Pym or his order, by virtue of which Pym obtained the delivery of the goods on their arrival in London.

At the trial before Lord ELDON at the last assizes for the city of Exeter the plaintiffs recovered a verdict under his lordship's direction, he being of opinion that no person having a lien on goods, can if he part with the possession afterwards stop them *in*

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[*5]

transitu, and thereby revive his *lien against the owner. But he gave the defendant's counsel leave to move this Court to enter a non-suit, if they should be of a different opinion.

Gibbs now moved accordingly, on the ground that the captain having received the goods from the defendant, and not being accountable to any other person for the delivery of them, (for he had received no orders from Gard), it was the same as if they had remained in the actual possession of the defendant. That there could have been no doubt if the defendant had taken the bill of lading to his own order at first; and his taking it afterwards before the goods got to the possession of Gard was the same thing. It was equally an acknowledgment by the captain that he held the custody of them on the defendant's account.

LORD KENYON, Ch. J. :

The right of lien has never been carried further than while the goods continue in the possession of the party claiming it. Here the goods were shipped by the order and on account of the bankrupt, and he was to pay the expense of the carriage of them to London: the custody therefore was changed by the delivery to the captain. In the case of *Kinloch v. Craig* † where I had the misfortune to differ with my brethren, it was strongly insisted that the right of lien extended beyond the time of actual possession; but the contrary was ruled by this Court, and afterwards in the House of Lords: though there the factor had accepted bills on the faith of the consignments, and had paid part of the freight after the goods arrived.

GROSE J. :

[6] I consider the delivery of the goods by Pym to the captain to be equivalent to a delivery to Gard.

Per CURIAM :

Rule refused.

† 1 B. R. 664; 3 T. R. 119, afterwards in *Dom. Proc. ib.*, 786.

SMITH AND ANOTHER v. BUCHANAN AND ANOTHER.

(1 East, 6—12.)

1800.
Nov. 11.

A discharge under a commission of bankrupt in a foreign country is no bar to an action for a debt arising here against the bankrupt by a creditor a subject of this country.†

[6]

ASSUMPSIT for goods sold and delivered, and upon the common money counts. [The pleas (*inter alia*) stated a law of Maryland entitled "An Act respecting insolvent debtors," whereby, on certain conditions, involving the delivery up of his property to the creditors, the debtor should be discharged, and that the conditions had been complied with. Replication that the causes of action had accrued to the plaintiffs within this kingdom of England: to which there was a general demurrer and joinder.]

Giles, in support of the demurrer :

The order of discharge obtained by the defendants under the law of the state of Maryland is analogous and equivalent to the certificate of a bankrupt here; and having been issued by a competent jurisdiction in the case of subjects of that State resident there at the time, though it has not the binding force of a law in this country, yet the courts here will take cognizance of and give it effect by adoption and the courtesy of nations. * * It is in every day's practice that actions are sustained by assignees and trustees under foreign commissions of bankrupt against

[8]

[9]

† This decision was followed in the case of a discharge under a Scotch process of *cessio bonorum* in *Phillips v. Allan* (1828) 8 B. & C. 477. It is recognised as good law in *Ellis v. McHenry* (1871) L. R. 6 C. P. 228, 40 L. J. C. P. 109, and in *Tharsis Sulphur &c. Co. v. Société des Métaux* (1889) 58 L. J. Q. B. 435, 439; and is confirmed by the judgment of the Court of Appeal in *Gibbs v. Société Industrielle &c.* (1890) 25 Q. B. D. 399, 59 L. J. Q. B. 510.

As to the case of *Phillips v. Allan*, it is to be observed that the process of *cessio bonorum* was a domestic process of the Scotch courts under a

practice which existed in Scotland long before the Union, and that the case does not in any way conflict with the authorities as to the effect, throughout Her Majesty's dominions, of a discharge under the paramount authority of an Imperial Act of Parliament. That effect is indeed recognised by the judgment of BAILEY, J. (8 B. & C. 482); and see *Sidaway v. Hay* (1824) 3 B. & C. 12; *Royal Bank of Scotland v. Cuthbert, Stein's case*, 1 Rose, 462, 486; and the above-mentioned case of *Ellis v. McHenry*, L. R. 6 C. P. 228, 40 L. J. C. P. 109.—R. C.

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[*10]

debtors of the bankrupts residing here; which shews that the law recognizes the alteration of the property. But it would be inconsistent and unjust to give effect to so much of the law as divests the property out of the bankrupt, and deny him the benefit of the condition on which it was so divested, namely, indemnity against antecedent claims. * * It is true that it was holden in *Folliott v. Ogden*† that a man's having *been deprived of all his property by an act of confiscation of a foreign state, which at the same time provided a fund for the payment of his debts there, was no answer at law to a suit by a creditor here. But that went on the ground that no nation will take cognizance of the laws of forfeiture of another. And in *Wright v. Nutt*‡ those circumstances were holden to be sufficient grounds for a court of equity to interpose by injunction against the suit of the creditor. * * The case however of *Ballantine v. Golding*§ comes nearest to the present, where a certificate obtained under a commission of bankrupt in Ireland was holden a bar to an action here against the bankrupt for a debt arising prior to the bankruptcy. It is true that the debt there was contracted in Ireland; but Lord MANSFIELD recognized it as a general principle, that what is a discharge by the law of one country will operate as a discharge in another. And he said that he remembered a case in Chancery of a *cessio bonorum* in Holland, which is a discharge there, having been allowed the same effect here.

R. Smith, contra, was stopped by the Court.

LORD KENYON, Ch. J. :

[*11]

It is impossible to say that a contract made in one country is to be governed by the *laws of another. It might as well be contended that if the State of Maryland had enacted that no debts due from its own subjects to the subjects of England should be paid, the plaintiff would have been bound by it. This is the case of a contract lawfully made by a subject in this country, which he resorts to a court of justice to enforce; and the only

† 2 R. R. 736, 1 H. Blac. 123.

‡ 1 H. Blac. 136.

§ M. 24 Geo. III. B. R.; Cooke's Bank. L. 347, 1st edit.

answer given is that a law has been made in a foreign country to discharge these defendants from their debts on condition of their having relinquished all their property to their creditors. But how is that an answer to a subject of this country suing on a lawful contract made here? how can it be pretended that he is bound by a condition to which he has given no assent either express or implied? It is true that we so far give effect to foreign laws of bankruptcy as that assignees of bankrupts deriving titles under foreign ordinances are permitted to sue here for debts due to the bankrupts' estates: but that is, because the right to personal property must be governed by the laws of that country where the owner is domiciled. That was recognized in the case of *Hunter v. Potts*.† The Court there considered the assignment of the bankrupt's effects in another country, although in fact made *in invitum*, as equivalent here to a voluntary conveyance by him.‡ The case of *Ballantine v. Golding* is very distinguishable from the present; for there the debt was contracted in Ireland where the commission issued. But in the same page of the book§ from whence that was quoted is to be found an opinion of Lord TALBOT's directly contrary to the conclusion we *are desired to draw in this case; for there he held that though the commission of bankrupt issued here attached on the bankrupt's effects in the plantations, yet his certificate would not protect him from being sued there for a debt arising therein. The same rule then must prevail here.

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[*12]

LAWRENCE, J. :

If the defendants had made a voluntary assignment of all their property to the use of their creditors, it is not pretended that that would have been a bar to the suit of the plaintiffs; and yet the title of the assignee would have been as valid here as under the foreign commission; which shews that the validity of the title under such an assignment cannot make any difference in the present argument. Then it rests solely on the question,

+ 2 R. B. 353, 4 T. R. 182, 192.

† Cook. Bank. L. 347, cites Beawes
Lex Merc. 499.

§ See the case of *Waring v. Knight*, sittings at Guildhall after

Hil. T. 5 Geo. III. cor. Lord Mansfield where the same opinion was entertained. *Ib.* addenda to 1st edit.

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Whether the law of Maryland can take away the right of a subject of this country to sue upon a contract made here, and which is binding by our laws? This cannot be pretended: and therefore the plaintiffs are entitled to judgment.

GROSE and LE BLANC, Justices, concurring,

Judgment for the plaintiffs.†

1800.
Nov. 14.

DOE, ON THE DEMISE OF CHILLCOTT, v. WHITE.

(1 East, 33—37.)

[33]

Power to X. to give "said effects" to Y. for life, following residuary bequest in a will of land and goods to X. for life, construed to include a power over the land.

[EJECTMENT for certain freehold lands and premises called Burge's Cottage, Burge's Estate, one moiety of Truckwell Estate, and Middle Whetcombe in the possession of Eleanor White. On the trial a verdict was found for the plaintiff, subject to the opinion of the Court on the following case:]

[*34]

Emanuel Chillcott being seized in fee of the premises in question and of the other moiety of Truckwell Estate, and being possessed of personalty, on the 16th of March, 1786, made his will of that date, duly executed and attested to pass real estates, in the following words; as touching *such worldly estate and effects wherewith it hath pleased God to bless me I give and dispose of the same in manner and form following; (after giving several pecuniary legacies to his relations), "Also I give unto Ann White my sister-in-law 20*l.* and the incomes of Burge's

† In *Pedder v. M'Master*, 8 T. R. 609, the Court refused to discharge a defendant out of custody who was arrested at the suit of a creditor resident here, on an allegation that the debt was contracted at Hamburg, and that the defendant had become a bankrupt and obtained his certificate there, and that the plaintiff might have proved his debt under the commission: for the Court

said that as the plaintiff was not resident in Hamburg at the time of the bankruptcy, they would not decide the question in a summary way, but put the defendant to plead his bankruptcy and discharge. The defendant accordingly filed such a plea, which the Court held to be informally pleaded; and the matter never came on again.

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WHITE.

Cottage, and her living in it if she think proper, during her natural life. Also I give unto Eleanor White 100*l.* and half of Truckwell Estate during her natural life. Also I give unto William Burge my servant man 5*l.* All the rest and residue of my goods chattels rights credits personal and testamentary estate, and also my lands tenements and hereditaments I give devise and bequeath unto Elizabeth Chillcott my dearly beloved wife during her natural life, whom I make my sole executrix. And I do allow her the said Elizabeth Chillcott to give what she thinks proper of her said effects to her sisters Elinor White and Ann White during their natural lives. And after the above lives being expired, viz. Eliz. Chillcott, Elinor White and Ann White, all the lands rights profits and hereditaments of Truckwell Estate to come to John Chillcott my kinsman living in London† or his male heir.”*

[*35]

* * The testator died on the 24th of May, 1787, so seized of his several estates. Elizabeth Chillcott his widow, and her sisters, Eleanor the defendant, and Ann White surviving him. The lessor of the plaintiff the said John Chillcott at the time of the testator's death was and is now his heir at law. On the death of the testator Ann White entered into Burge's Cottage, Eleanor White into the moiety of Truckwell Estate, so devised to them respectively, and Elizabeth Chillcott (who proved the will and took possession of all the testator's personalty) entered into the residue of the real estates. Ann White died on the 9th of April, 1791, in the lifetime of Elizabeth Chillcott, who thereupon took possession of Burge's Cottage; and on the 23rd of April, 1792, made her will duly executed to pass real estates; wherein reciting the will of her husband and the power thereby given to her “to give what she thought proper of the said effects (of her husband) to her sisters Eleanor White and Ann White during their natural lives;” and reciting also the death of Ann White, she thereby, in pursuance of the power reserved and of all other powers wherewith she was either in law or equity invested, gave and devised unto her sister Eleanor White for her life “all such goods chattels rights credits personal and testamentary estate lands tenements and hereditaments as she was empowered under or by virtue of the said recited will of her said deceased husband

† To whom the testator had before given a pecuniary legacy.

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[*36]

to give and devise." She also devised unto her said sister E. W. "all the rest residue and remainder of her goods and chattels rights and credits real and personal estate and effects whatsoever and wheresoever, of what nature or quality soever, subject to and charged with the payment of her debts and funeral expenses." And appointed her said *sister E. W. sole executrix, and residuary devisee. On the 25th of December, 1795, Elizabeth Chillcott died, on whose death the defendant Eleanor White proved the will, took possession of the whole of the personalty, as well that which was Emanuel Chillcott's the testator's, as that which was of Elizabeth's own acquiring, and entered into all the real estate which was in Elizabeth Chillcott's possession, and still holds the same. The question was whether the lessor of the plaintiff was entitled to recover the whole or any part of the above premises. * *

[*37]

Dampier, for the plaintiff, contended that Elizabeth Chillcott had no power under the will of Emanuel Chillcott to dispose of any part of the real property. The testator only allowed his widow to give "what she thought proper of her said effects" to her sisters for their lives; and the word effects will not carry land. It is usually applied only to personalty, and the testator has so applied it in his will; for at the beginning of his will he used the word estate with reference to his real, and the word effects with reference to his personal property. It may be said that Emanuel Chillcott having before given both real and personal property to his widow, the words "said effects" must apply to both; but that is not necessarily so; and if the meaning of the will be only doubtful the Court will construe it in favour of the heir at law. It is true the lands &c. are devised over to the heir at law after the decease of the two sisters as well as his widow; but he had before given to each of the sisters an interest in part of the landed estate, which is sufficient to satisfy those words. *At any rate the lessor of the plaintiff is entitled to recover Burge's Cottage, which the testator had given to Ann White for her life, and which therefore cannot be said to be any part of "her" (the widow's) "said effects" not having been before bequeathed to her; and of such part only as had been

before devised to herself was the widow allowed to make any further disposition.

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v.
WHITE.

Tripp, contra, was stopped by the Court.

LORD KENTON, Ch. J. :

It is very plain what the testator meant. After giving a few legacies and bequests he devises all the residue of his property both real and personal of every description to his widow for her life, and then allows her to give what she thinks proper of her said effects to her sisters for their lives. This description must apply to the property which he had been before dealing out, amongst which Burge's Cottage is mentioned by name; the income of which he had given to Ann White, and her living in it if she thought proper; over all of which not before disposed of he meant to give his widow a control. And this is confirmed by the terms of the devise to the heir at law, who is not to take any thing till after the death of all the sisters.

PER CURIAM :

Judgment of nonsuit to be entered.

THE KING v. CLARKE.

(1 East, 38—48.)

1800.
Nov. 17.

[38]

It is no objection to relators applying for a *quo warranto* information against the defendant for exercising the office of an alderman (his election to which they had opposed), that they afterwards attended at and concurred in corporate meetings whereat he presided, or where he attended in his official character: such application being made within the time limited by law.

THE defendant was called upon by a rule to shew cause why an information in nature of a *quo warranto* should not be exhibited against him, to shew by what authority he claimed to be an alderman of the borough of East Retford in the county of Nottingham. * * *

The principal ground on which the present rule was opposed was that of the acquiescence of the seven relators, upon whose affidavits the rule was obtained, who were burgesses of the

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v.
CLARKE.

[*39]

borough; as to which the circumstances appeared to be these : The election of the defendant to *the office in question took place in July, 1795, and it was not pretended that any of the relators concurred in the act of his election, but on the contrary left the hall after the election of Chapple in which they had taken a part. The affidavits against the rule then stated [amongst other things that the relators have attended corporate meetings and elections of junior bailiffs and aldermen, at which the defendant was present both as alderman and senior bailiff, and that they had voted on such occasions; and that they never objected to the defendant's giving his vote as alderman on such occasions.]

[40]

Gibbs and *Yates* for the defendant, having first argued upon the merits for the regularity of the election, then contended that, even admitting it to have been irregular, yet after an acquiescence for so long a time on the part of the whole corporation, including the present relators, they were now estopped from objecting to it. No opposition was made to the mandamus to swear in the defendant in the first instance, nor to his subsequent election to the office of senior bailiff, which can only be holden by an alderman, and which was therefore a recognition of his title as alderman. And since that appointment several elections of aldermen and others have been made without any question, all which derivative titles will be destroyed if the defendant be ousted. As before the late Act of the 32 Geo. III. c. 58, the Court often refused applications, from mere lapse of time, within twenty years, which was the period of limitation at that time; so neither was that statute intended to limit the discretion of the Court in refusing applications of this sort within six years, the limitation thereby fixed. [They referred to the *Winchelsea* cases, (4 Burr. 1962); and quoted, at some length from a MS. note of those cases by Mr. Justice Yates.]

[45]

The COURT desired the counsel in support of the rule to confine themselves to the objection made to the prosecution of these relators; saying that as to the validity of the election they would not take upon them to decide it in this stage; it was enough to

say that it was sufficiently doubtful to put it in a course of inquiry before a jury.

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Perceval and *Balguy*, in support of the rule :

* * It is not pretended that the relators had voted for the defendant's election as alderman, which they now sought to impeach ; but as far as they could they opposed it by voting for another candidate. * * If their attendance afterwards in conjunction with the party so elected at annual corporate meetings be a ground for denying their application, the statute which gives them leave to apply within six years will be rendered nugatory ; for such elections are indispensably * necessary in order to carry on the government of the place, and it is the duty of every corporator to attend. * * It is not sworn that any of them actually concurred in his election as senior bailiff, though they might not have openly opposed it. They were then stopped by the Court.

[*46]

LORD KENYON, Ch. J. :

The Legislature have lately had this subject under revision, and have thought proper to draw a line of limitation of six years, after which no corporator's title shall be impeached for any original defect in it.† This is a most wise and beneficial rule ; and it is fit that our discretion should be governed by the same limitation in ordinary cases, so as not unnecessarily to fetter these applications beyond what the Legislature have thought proper to do. The Court have indeed on several occasions said, and said wisely, that they will not listen to a common relator coming, though within the time limited, as a mere stranger to disturb a corporation with which he has no concern,‡ nor even a

† By the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50) s. 73, a municipal election is to be deemed valid if not called in question by election petition, or by information in the nature of *quo warranto*, within twelve months of the election.—R.C.

‡ In the case of *The King v. Kemp*, H. 29 Geo. III. a similar application was made against the

defendant for claiming, &c. to be a freeman of the borough of Seaforth, at the relation of one Watts, who was a stranger to the corporation, and who rested the application on his own affidavit, which was insisted on as a preliminary objection to granting the rule ; though there was also a sufficient answer given upon the merits. The Court discharged

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v.
CLARKE.
[*47]

corporator who has acquiesced or *perhaps concurred in the very act which he afterwards comes to complain of when it suits his purpose; and so far I think we have determined rightly.† But I have never known the restriction carried further; nor am I prepared to carry it to the length now contended for. It is said these parties are concluded from impeaching the defendant's title, because he has been since elected senior bailiff without their opposition, and because they have attended other corporate meetings with him. But I cannot impute this as blame to them. There must be magistrates, and the powers of government cannot stand still till the validity of a former disputed election is ascertained. In some corporations, whose charters contain non-intromittant clauses, justice would be at a stand if such elections did not take place. The necessity of a government *de facto* is recognized even in the instance of title to the Crown by the stat. passed in the reign of Hen. VII.‡ In this instance therefore the relators having objected to the defendant's election to the office of alderman at the time, I cannot think that their not having opposed his election since to a necessary annual office of magistracy is such an acquiescence in the original defect of his title as precludes them from making this application within the time allowed by law. With respect to the merits, the question is put too much in *dubio* by the affidavits on either side for the Court to say that it is not proper to be inquired into by a jury.

Per CURIAM :

Rule absolute.§

the rule with costs. And Lord KENYON, Ch. J. in delivering his opinion; after shewing that Watts' affidavit had been completely answered, said, "Then it is to be considered who Watts is. If he had shewn that his own and other persons' privileges had been injured, he would perhaps have had reason for preferring this complaint; but the fact is otherwise. He comes here as a perfect stranger to the corporation, prowling into other men's rights. I do not mean

to say that a stranger may not in any case prefer this sort of application; but he ought to come to the Court with a very fair case in his hands."

† Cited by SHEER, J. in *Reg. v. Left-house* (1866) L. R. 1 Q. B. 444.—R.C.

‡ 11 H. VII. c. 1.

§ So late as in M. 29 Geo. III. the Court held in the case of *The King v. Bond*, 2 T. R. 767, that no possession of a corporate franchise for less than 20 years *was of itself

[*48]

SHIRREFF AND ANOTHER *v.* WILKS (ORIGINALLY SUED
WITH G. BISHOP AND W. ROBSON, WHO HAVE
BEEN OUTLAWED IN THIS SUIT).

1800.
Nov. 18.
[48]

(1 East, 48—55.)

Two (of three) partners, who had contracted a debt prior to the admission of the third partner into the firm, cannot bind him without his assent by accepting a bill drawn by the creditor upon the firm in their joint names.

THIS was an action upon the case upon a bill of exchange for 78*l.* dated the 5th of November, 1796, payable to the order of the plaintiffs two months after date, which was stated in the declaration to have been drawn by them on the said G. Bishop, W. Robson and J. Wilks by the name and description of Messrs. George Bishop & Company, and to have been accepted by them. The defendant Wilks pleaded the general issue, on which issue was joined.

The cause came on to be tried before Lord KENYON at Guildhall on the 5th of June last, when the jury found a verdict for the plaintiffs for 90*l.* 10*s.* including interest on the bill; subject to the opinion of this Court on the question, whether the plaintiffs were entitled to recover under the circumstances of the case?

The plaintiffs in October, 1795, sold and delivered a quantity of porter to Bishop & Wilks, who were then partners, which porter was entered in the plaintiffs' books *in the names of Wilks & Bishop; and the same was afterwards shipped for the West

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a sufficient objection to the granting of an information in the nature of a *quo warranto*: and it was granted there after a possession of 12 years. It was there also considered to be no objection to the application that the defendant's title had been before attacked by a similar information which was afterwards abandoned. Afterwards in the case of *The King v. Dickinson* in H. 31 Geo. III. 2 T. R. 284, the Court came to the resolution

of limiting in future their own discretion in granting applications of this nature to six years, beyond which they would not under any circumstances suffer a party's title to be impeached. And they acted upon this rule in the case of *The King v. Peacock* in E. 32 Geo. III. 2 T. R. 684. Soon after the stat. 32 Geo. III. c. 58, was passed, which stamped the propriety of it with legislative authority.

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Indies, and the defendant Wilks paid the shipping charges. Robson became a partner with Bishop & Wilks in April, 1796, and continued so till the 8th of November following, when their partnership was dissolved. The defendant Wilks previous to the dissolution of the partnership sent to the plaintiffs a memorandum or calculation in his own handwriting of certain deductions claimed by him in respect of the porter. The balance due to the plaintiffs in respect of the porter was 78*l.* for which the plaintiffs drew upon the defendants the bill mentioned in the declaration, which bill was accepted by Bishop in the partnership firm of all the defendants, by his subscribing thereon "Accepted G. B. & Co."

Lawes for the plaintiffs :

As between the plaintiffs and Bishop & Wilks the original partners by whom the debt was contracted, it must be admitted that Wilks is bound by Bishop's acceptance, though it were made without his concurrence, because one partner may bind another by accepting a bill on account of a partnership debt. It is true that one partner cannot pledge the security of another for his own private debt,[†] nor if there be any fraud in the transaction as between him and the creditor to whom such security is given : but this was a debt incurred in the course of trade and not of an individual or private nature. And no fraud is found here, nor can any inference of fraud arise from the facts stated. The creditors were guilty of no imposition in drawing the bill originally, nor *could they control the manner in which it was to be accepted : but when accepted by any one of the house in their joint names they must all be bound by it in the ordinary course of commercial dealings. If Wilks would have been bound, though he did not concur in the act of acceptance, and if the partnership fund were originally answerable to the plaintiffs, the introduction of a third partner cannot vary the case ; it was only the continuance of the old partnership with the addition of a new member ; and the bill was drawn on the fund which really and

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[†] *Gregson and others v. Hutton* Sittings after Mich. T. 1786 at Guild-
and *Foxcroft*, B. R. E. 22 Geo. III. ; hall, cor. Buller, J.
Marsh v. Vansommer and another.

truly ought to pay it. The debt as between the defendants must be taken to have been transferred to the new partnership: but whether that were so or not is a matter to be settled between themselves, with which the plaintiffs have no concern. With regard to creditors the act of one partner must be taken to bind all the rest, otherwise all dealing with them must be attended with great perplexity. It may not be known to many at what time such a partner was taken into the firm.

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Gibbs, contra, was stopped by the Court.

LORD KENYON, Ch. J. :

I do not know how this case came to be reserved for the opinion of the Court; for I have decided the same question repeatedly at the sittings, and the propriety of my decision has never been canvassed again upon a motion for a new trial. This is an action brought against three persons, Wilks, Bishop, and Robson, as acceptors of a bill of exchange. It appears that the acceptance was in fact made by Bishop alone in the name of the firm. The consideration for this bill was some porter which had been sold by the plaintiffs to Wilks and Bishop only, at a time when Robson had no concern with the house. Then the plaintiffs, knowing this, draw the bill upon all the three partners, and knowingly take an acceptance from one of them to bind the other two, one of whom, Robson, had no concern with the matter and was no debtor of theirs; no assent of his being found, and nothing stated to shew that he had any knowledge of the transaction. It is hard enough for one partner in any case to be able to bind another without his knowledge or consent; but it would be carrying the liability of partners for each other's acts to a most unjust extent if we suffered a new partner to be bound in this manner for an old debt incurred by other persons. The plaintiffs therefore ought not in justice to have taken this security by which they were to bind one who was not their debtor: the transaction is fraudulent upon the face of it. It is no answer to say that one partner has a general power of binding the rest. So an executor has power to bind the assets of his testator, and to sell and dispose of his effects; and the law reposes a

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confidence in him that he will apply the proceeds in payment of the testator's debts and legacies: but if fraud could be proved in any particular transaction between the executor and a purchaser such a sale would be void. In the case of *Worseley v. De Mattos*,† Lord MANSFIELD, in delivering the opinion of the Court, says, that "valid transactions as between the parties may be fraudulent by reason of covin, collusion, or confederacy, to injure a third person:" and he instances, "if a man, knowing that a creditor has obtained a judgment against his debtor, buy the debtor's goods for a full price, to enable him to defeat the creditor's execution, it is fraudulent. Again, if a man, knowing that an executor is wasting and turning the testator's estate into money, the more easily *to run away with it, buy from the executor with that view, though for a full price, it is fraudulent." The same doctrine was recognized by Lord HARDWICKE in *Mead v. Lord Orrery*;‡ and again by Lord MANSFIELD in *Whale v. Booth*, cited in the notes of the report of *Farr v. Newman*;§ and also in the case of *Elliot v. Merryman*,|| and in other cases. And nothing can be better established as a general rule than that the law will set aside every contract which is fraudulent. Such is the case here. Wilks & Bishop owed money to the plaintiffs; these latter, knowing that Robson had no concern with the matter, fraudulently receive from Wilks & Bishop a security by which Robson is to be bound: this therefore cannot be enforced in this action.

GROSE, J. :

This is a mere fraudulent attempt to make Robson pay the debt of Bishop & Wilks; and the plaintiffs shall not be permitted to avail themselves of a security so obtained in order to bind a man without his assent for the payment of a debt [by a person] who owed them nothing. And the security being void against Robson, the plaintiffs cannot recover in this action against the three, wherein if he obtained judgment he might sue out execution against any of the defendants.

† 1 Burr. 474, 5.

‡ 3 Atk. 235, 7.

§ 2 R. R. 483, 4 T. R. 621.

|| 3 Barnard. Ch. Rep. 81. Vide *Crane v. Drake*, 2 Vern. 616.

LAWRENCE, J. :

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The plaintiffs in this action declare as upon a promise by three defendants, and consequently to entitle themselves to recover they must prove a promise either express or implied binding upon all the three : in this they have failed, and therefore there must be judgment against them. In addition to the authorities cited *by my Lord to shew that Robson was not bound by this act of his partners, is the case of *Hope v. Cust*. (He then read the following note from a MS. of the late Mr. Justice Buller, taken by him, when he was at the bar.) “ *Hope v. Cust*, Sittings at Guildhall after Mich. Term, 1774. Mr. Fordyce, who traded very largely in his separate capacity as well as in the business of a banker in partnership with others, having considerable dealings in his private capacity with Hope & Co. in Holland, did, for and in the names of himself and partners, give them a general guarantie for the money due from him in his separate capacity. Fordyce became a bankrupt, and afterwards all the partners became bankrupts. And a bill was filed in the Court of Chancery by Hope & Co. in order to have the benefit of this guarantie : upon which that Court directed an issue to try the validity of it. Lord MANSFIELD in summing up the evidence to the jury said, there is no doubt but that the act of every single partner in a transaction relating to the partnership binds all the others. If one give a letter of credit or guarantie in the name of all the partners it binds all. But there is no general rule which may not be infected by covin, or such gross negligence as may amount to or be equivalent to covin : for covin is defined to be a contrivance between two to defraud or cheat a third. Therefore the whole will turn on this, whether the taking the guarantie from Fordyce himself in his own handwriting, without consulting the other partners or having their privity, is not such gross negligence in the Hopes as will amount to a fraud or covin. Fordyce was acting in two several capacities, having transactions in his own name only, for his own separate benefit, and in the names of the partnership for his own benefit. This case comes *out of Chancery, where an affidavit or answer of all parties might have been had if necessary ; but none such has been produced, and therefore it must be taken that the partners knew nothing of it,

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and had no profit by it, or privity in the transaction. Another fact to be granted is, that as between Hope & Co. and Gurnal & Co. and Fordyce, the whole transactions are avowedly with Fordyce only in his separate capacity. The next fact is the correspondence in 1770, preceding the second guarantie. It is clear that Fordyce's deposits and interest in the funds were both doubted, and then the Hopes tried to make a scheme to get a second security without shocking him, by suggesting there was a new partner. The first guarantie was given in 1764, and that never had been called in, and still existed. There was then no occasion for a new one: for the change of a partner and taking in a new one would not destroy a former guarantie. The scheme was to get security for debts not well secured, the goodness of which was doubted; and they therefore get this from Fordyce alone, clandestinely, without the knowledge of his partners. If the fact be clear that Hope & Co. and Gurnal & Co. knew that this was done to cheat the partners of Fordyce, there is no question in the cause. But it is manifest that they trusted to it as binding on the partnership. Therefore this brings it to the second question, Whether it be not a gross negligence; especially as they knew at the time that Fordyce was acting in his separate capacity; and this security was intended to indemnify them against his separate debts. Verdict for defendant. Lord MANSFIELD afterwards, in his report to the Court of Chancery, on a motion being made for a new trial, said, three things were established to the satisfaction of himself *and the jury. First, that the transactions between Hope & Co. and Fordyce were wholly on Fordyce's account. Secondly, That the partners of Fordyce derived no profit or benefit whatsoever from them. Thirdly, That they had no notice of the guarantie, and consequently did not acquiesce in it. And Lord MANSFIELD said he left it to the jury, whether under these circumstances the taking of these guaranties were, in respect of the partners, a fair transaction or covinous, with sufficient notice to the plaintiffs of the injustice and breach of trust Fordyce was guilty of in giving them."

[*55]

LE BLANC, J. :

The case must be determined in the same manner as if Robson

had pleaded to the action. It seems admitted that if one of several partners pledge the partnership fund for his individual debt, that will not bind the rest. Now I see no difference between the case of one and the case of two of several partners pledging the joint fund for their individual debts; which is the case before us.

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C.
WILKS.

Postea to the defendant.

FARR v. PRICE.

(1 East, 55—58.)

1800.
Nov. 18.

A plaintiff having claimed upon a promissory note, which is invalid for want of a proper stamp, is not debarred from claiming upon any ground of action which he can prove without the aid of the note.

[55]

THIS was an action on a promissory note for 25*l.* 5*s.* dated the 14th of July, 1797, payable to order three months after date. The declaration also contained the common counts. The note was given by the defendant to one Jones and by him indorsed to the plaintiff. At the trial before Thomson, B. at the last Spring assizes for Hereford the only evidence produced was the note itself, which was objected to, as having a nine-penny instead of an eight-penny stamp, as required by the stat. 37 Geo. III. *c. 90, which was in force before the making of this note: a verdict was however taken for the plaintiff, reserving the question of law for the opinion of the Court.

[*56]

Bevan obtained a rule in Easter Term last, calling on the plaintiff to shew cause why the verdict should not be set aside and a new trial had. This was moved on the authority of *Robinson v. Drybrough*, 6 Term Rep. 317, where it was holden that articles of agreement under seal could not be given in evidence unless stamped with a deed stamp, although the respective stamps were of the same value.

[After argument, Lord KENYON, Ch. J. and LE BLANC, J. with the assent of the other Judges, gave judgment, making the

Rule absolute.]

Lord KENYON then observed that as there were other general

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FARR
v.
PRICH.

counts in the declaration, if the plaintiff could give other evidence of a consideration paid by him to the defendant, he would not be concluded from recovering by the fact of the defendant's having given this imperfect promissory note for it.

1800.
Nov. 24.

VANDYCK AND OTHERS v. HEWITT.

(1 East, 96—98.)

[96]

The premium paid on an illegal insurance to cover a trading with an enemy cannot be recovered back, though the underwriter cannot be compelled to make good the loss.

THE plaintiff declared upon a policy of insurance on goods at and from London to Embden or Amsterdam, at a premium of ten guineas per cent. to return five upon their arrival at the place of destination; with an averment that the insurance was made for the benefit of certain persons therein named; and then declared as upon a loss by capture in the course of the voyage insured. The declaration also contained counts for money paid and for money had and received.

The goods were shipped on board a Prussian neutral vessel, on account, partly of the plaintiffs who were naturalized foreigners resident in London, and partly of certain other persons, aliens, then resident in Holland. At the trial at Guildhall the insurance itself was abandoned on the ground of its being intended to cover a trading with an enemy's country, Holland being at the time of such insurance in a state of hostility with this kingdom; and therefore falling within the decision of the case of *Potts v. Bell*:† but it was contended that the plaintiffs were entitled to recover back the premium, because the policy never attached, and consequently the defendant's risk never commenced. Lord KENYON permitted a verdict to be taken for the plaintiff for that amount, with liberty to the defendant's counsel to move to set that aside and to enter a verdict for the defendant.

A rule *nisi* was accordingly obtained on a former day in this Term for that purpose; against which

† 8 T. R. 548, p. 452, *ante*.

Erskine, Park and J. Warren now shewed cause.

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^{c.}
HEWITT.

[*97]

Here was no fraud intended, as in the case of smuggling *transactions. The assured are neutral foreigners, who have paid money to the defendant for a certain consideration the benefit of which they are precluded from receiving by a rule of public policy: it is but just therefore that as the insurance never attached, and the underwriter has not incurred any risk, he should not be suffered to retain the consideration.† Admitting the contract to be illegal, yet according to *Lacaussade v. White*,‡ the party who has deposited money upon an illegal consideration, (as in that case upon an illegal wager) may recover it back again even after the event is determined against him. They also referred to the case of *Nesbitt v. Whitmore* in Easter Term last, where this point was agitated, and where finally the premium was returned.§

Law and Garrow *contra* were stopped by the Court.

LORD KENYON, Ch. J. :

There is no distinguishing this on principle from the common case of a smuggling transaction. Where the vendor assists the vendee in running the goods to evade the laws of the country he cannot recover *back the goods themselves or the value of them.¶ The rule has been settled at all times, that where both parties

[*98]

† *Tyrie v. Fletcher*, Cowp. 668.

‡ 7 T. R. 535.

§ In that case, under similar circumstances with the present, *Giles* for the plaintiff admitted that he could not recover the loss upon the policy since the determination in *Bell v. Potts*: but he contended that the plaintiff was entitled to take a verdict for the premium, which had not been paid into Court. This was resisted by *Park* for the defendant, on the ground that no such question had been reserved at the trial. Et per CURLIAM: That point not having been made, and the jury not having assessed any such damages, but

only the amount of the loss to be recovered, supposing the plaintiff to be entitled to it in point of law, we cannot now interpose any other sum in lieu of their verdict. Whereupon *Giles* prayed leave to amend the verdict by the Judge's notes. The COURT with much reluctance, and with a view to a compromise, granted a rule to shew cause. And afterwards it was agreed between the parties that the premium should be repaid, without costs on either side.

¶ Vide *Clugas v. Penaluna*, 2 R. R. 442, 4 T. R. 266; and *Waymell v. Read*, 2 R. R. 675, 5 T. R. 599.

VANDYCK
v.
HEWITT are in *pari delicto*, which is the case here, *potior est conditio possidentis*.

LE BLANC J. :

The ground of the determination in *Lacaussade v. White* has been since very much canvassed in a later case of *Howson v. Hancock*,† where it was considered that money deposited upon an illegal wager, and paid over to the winner, could not be recovered back from him.

Per CURIAM :

Rule absolute for the verdict to be entered for the defendant.‡

1800.
Nov. 26.

M'ANUS v. CRICKETT.

(1 East, 106—110.)

[106]

Where a servant quits sight of the object for which he is employed, and, without having in view his master's orders§ does that which his malice suggests, he no longer acts in pursuance of the authority given him, and the master is not answerable for the act.

THIS case was very much discussed at the bar, upon a motion to set aside a verdict for the plaintiff and enter a nonsuit, by *Gibbs* and *Wood*, against the rule, and *Garrow* and *Giles* in support of it. The Court took time to consider of their judgment; and afterwards entered so fully into the cases cited and the arguments urged at the bar, that it is unnecessary to detail them in the usual form.

Lord KENYON, Ch. J. now delivered the unanimous opinion of the Court :

[*107] This is an action of trespass, in which the declaration charges that the defendant with force and arms drove a * certain chariot against a chaise in which the plaintiff was riding in the king's

† 8 T. R. 575.

‡ So in *Lewry v. Bourdieu*, Dougl. 468, the Court held that the assured could not recover back the premium

paid upon a gaming policy without interest, which is illegal within the stat. 19 Geo. II. c. 37.

§ See note at p. 520, *post*.—R. C.

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highway, by which the plaintiff was thrown from his chaise and greatly hurt. At the trial it appeared in evidence that one Brown, a servant of the defendant, wilfully drove the chariot against the plaintiff's chaise, but that the defendant was not himself present,† nor did he in any manner direct or assent to the act of the servant, and the question is, if for this wilful and designed act of the servant an action of trespass lies against the defendant his master? As this is a question of very general extent, and as cases were cited at the bar, where verdicts had been obtained against masters for the misconduct of their servants under similar circumstances, we were desirous of looking into the authorities on the subject before we gave our opinion; and after an examination of all that we could find as to this point, we think that this action cannot be maintained. It is a question of very general concern and has been often canvassed; but I hope at last it will be at rest. It is said in Bro. Abr. tit. Trespass, pl. 435: "If my servant contrary to my will chase my beasts into the soil of another I shall not be punished." And in 2 Roll Abr. 553: "If my servant without my notice put my beasts into another's land, my servant is the trespasser and not I; because by the voluntary putting of the beasts there without my assent, he gains a special property for the time, and so to this purpose they are his beasts." I have looked into the correspondent part in Vin. Abr. and as he has not produced any case contrary to this, I am satisfied with the authority of it. And in Noy's Maxims, ch. 44: "If I command my servant to distrain, and he ride on the distress, he shall be punished not I." *And it is laid down by Holt, Ch. J. in *Middleton v. Fowler*, Salk. 282, as a general position, "that no master is chargeable with the acts of his servant but when he acts in the execution of the authority given him." Now when a servant quits sight of the object for which he is employed, and without having in view his master's orders‡ pursues that which his own malice suggests, he no longer acts in pursuance of the

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† No person was in the carriage: the act was done by the servant either in going for or after he had set down his master.

‡ To make this judgment accord with modern cases, we must now for

"orders" read "interest or supposed interest." See *Seymour v. Greenwood* (1860) 7 H. & N. 355, 30 L. J. Ex. 189, 327; *Limpus v. Gen. Omnibus Co.* (1862) 1 H. & C. 526, 32 L. J. Ex. 34.—R. C.

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authority given him, and according to the doctrine of Lord Holt his master will not be answerable for such act. Such upon the evidence was the present case: and the technical reason in 2 Roll Abr. with respect to the sheep applies here; and it may be said that the servant by wilfully driving the chariot against the plaintiff's chaise without his master's assent gained a special property for the time, and so to that purpose the chariot was the servant's. This doctrine does not at all militate with the cases in which a master has been holden liable for the mischief arising from the negligence or unskillfulness of his servant who had no purpose but the execution of his master's orders; but the form of those actions proves that this action of trespass cannot be maintained: for if it can be supported, it must be upon the ground that in trespass all are principals; but the form of those actions shews, that where the servant is in point of law a trespasser, the master is not chargeable as such; though liable to make a compensation for the damage consequential from his employment of an unskilful or negligent servant. The act of the master is the employment of the servant; but from that no immediate prejudice arises to those who may suffer from some subsequent act of the servant. * * *

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Per CURIAM :

Rule absolute for entering a nonsuit.†

† The omitted portion of the above judgment is occupied with shewing that the master could not at all events be liable in *trespass*. The question of pleading as to the circumstances under which *case* and

not *trespass* was the proper form of action, is sufficiently dealt with, for the purposes of the Revised Reports, in the report of *Morley v. Gaisford*, 3 R. R. 432, and the reporter's note there reprinted.—R. C.

C. P. MICHAELMAS TERM.

BROWNING *v.* S. WRIGHT AND OTHERS, EXECUTORS
OF J. WRIGHT.

(2 Bos. & P. 13—28.)

1799.
Nov. 13.

[13]

The rule that the words of a covenant are to be taken most strongly against the covenantor must be qualified by the observation that a due regard must be paid to the intention of the parties as collected from the whole context.

A. after granting certain premises in fee to B. and after warranting the same against himself and his heirs, covenanted, that notwithstanding any act by him done to the contrary he was seised of the premises in fee, and that he had full power, &c. to convey the same; he then covenanted for himself, his heirs, executors, and administrators, to make a cart-way, and that B. should quietly enjoy without interruption from himself, or any person claiming under him; and, lastly, that he, his heirs, and assigns, and all persons claiming under him, should make further assurance. Held, that the intervening general words, "full power, &c. to convey," were either part of the preceding special covenant; or, if not, that they were qualified by all the other special covenants against the acts of himself and his heirs.

COVENANT against the representatives of James Wright. The declaration, [after stating the purport of the indenture, which is fully set forth below, assigned for breach that] J. Wright had not at the time of making the said indenture nor at any time before or since good right, full power, and lawful and absolute authority, or any right, power, or authority whatsoever to convey or assure the said piece or parcel of arable land or any part thereof to the said plaintiff his heirs and assigns in manner *aforesaid or in any manner whatsoever: by reason whereof [the plaintiff was lawfully evicted by a stranger.]

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The defendants prayed oyer of the indenture, and it was read to them in these words, to wit, "This indenture made, &c. witnesseth, that the said J. Wright, for and in consideration of the sum of 180*l.* of lawful money of Great Britain, to him in hand paid by the said plaintiff, at or before the sealing and delivery of

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these presents, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, enfeoffed, and confirmed, and by these presents doth fully, clearly, and absolutely grant, bargain, sell, enfeoff, and confirm unto the said plaintiff and to his heirs and assigns, all that piece or parcel of arable land (describing it) with the appurtenances and the reversion and reversions, remainder and remainders, rents, issues, yearly, and other profits of the said premises, and every part and parcel thereof; and all the estate and estates, right, title, interest, use, trust, claim and demand whatsoever, in law or equity, of him the said J. Wright, of, in, to, or out of the said premises, every or any part or parcel thereof; To have and to hold the said piece or parcel of arable land, hereby granted, bargained, sold, enfeoffed, and confirmed, or mentioned, or intended so to be, and every part and parcel thereof, unto the said plaintiff, his heirs, and assigns for ever, to and for the only proper use and behoof of the said plaintiff, his heirs and assigns, absolutely and for ever, without any condition, redemption, trust, or revocation whatsoever, and to and for no other use or uses, intents, trusts, or purposes whatsoever; and the said J. Wright and his heirs, the aforesaid piece or parcel of arable land, hereby granted or mentioned, or intended to be hereby granted unto the said plaintiff, or his heirs, against him the said J. *Wright, and his heirs, shall and will warrant and for ever defend by these presents. And the said J. Wright for himself, his heirs, executors, and administrators, doth covenant and agree to and with the said plaintiff, his heirs and assigns in manner and form following, that is to say, that he the said J. Wright for and notwithstanding any thing by him done to the contrary is lawfully and absolutely seised of the said piece or parcel of arable land hereby granted, of a good, sure, perfect, lawful, absolute, and indefeasible estate in fee-simple, without any manner of condition, limitation, use, or trust, or any other restraint, matter, or thing whatsoever, to alter, change, charge, defeat or determine the same; And that he hath good right, full power, and lawful and absolute authority to convey and assure the same to the said plaintiff, his heirs and assigns, in manner aforesaid: and the said J. Wright for himself, his heirs, executors, or administrators, doth further covenant and agree to

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and with the said plaintiff, his heirs and assigns, that he the said J. Wright shall and will, as soon as convenient, set out, at the expense of the said plaintiff, a cart-way to the said piece or parcel of arable land, through another field in the possession of William Triggs; which cart-way, when set out, the said J. Wright and his tenants are to have a free passage to and from the farm belonging to the said J. Wright, now in the occupation of the said William Triggs, without allowing any thing for the same; And that he, the said plaintiff, his heirs and assigns, shall and lawfully may, at all times hereafter, peaceably and quietly hold and enjoy the said piece or parcel of arable land hereby granted, and receive the rents and profits thereof to his and their own use and uses, without any manner of let or interruption of the said J. Wright, or any other person or persons claiming under him: And, lastly, that he the said J. Wright, his heirs and assigns, and all other persons claiming, or to claim any estate or interest of, in or to the said premises, or any part thereof, by, from, or under him, shall, and will from time to time, and at all times hereafter, make, suffer, and execute, or cause to be suffered and executed, all and every such further and other lawful and reasonable act and acts, assurance and conveyances in the law whatsoever, for the better and more perfect assuring and confirming of the said piece or parcel of arable land, unto the said plaintiff, his heirs and assigns, as by his or their counsel learned in the law of this realm, shall be reasonably devised, advised, or required. In witness *whereof the said parties to these presents have hereunto set their hands and seals the day and year first above-written."

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WRIGHT.

[*17 |

The defendants then demurred, and assigned for causes, "that the said indenture here brought into Court and in the said declaration mentioned doth not contain any covenant or warranty of title to or of right power or authority to convey or assure the said premises in the said declaration mentioned or any part thereof or for the enjoyment of the same by the said plaintiff or his heirs other than against the said J. Wright deceased and his heirs or other persons claiming under him. And for that the said plaintiff hath not in the said declaration alleged or shewn

BROWNING any defect of title to the said premises or any part thereof arising
WRIGHT. from or by reason of any thing done by the said J. Wright or his heirs or any person or persons claiming under him, or any eviction, interruption, molestation or disturbance done committed or occasioned by the said J. Wright or his heirs or any person or persons claiming under the said J. Wright. And also for that the said declaration is in other respects defective and insufficient."

Joinder in demurrer.

[After argument,]

[20] LORD ELDON, Ch. J. :

This case comes before the Court on demurrer, under the following circumstances. The action is brought by Thomas Browning, who appears on these pleadings to be the purchaser of an estate of inheritance in fee, and it is brought against the present defendants who are the personal representatives of the vendor James Wright, and are bound by certain covenants which are set forth upon this record. The plaintiff declares, that by indenture made on the 12th of October, 1787, between James Wright the testator of the defendants on the one part, and
 [*21] Thomas Browning the present plaintiff on the other part, *in consideration of 180*l.* paid, James Wright fully, clearly, and absolutely granted, bargained, sold, enfeoffed, and confirmed a certain piece of land, describing it. Now these words "granted, bargained, sold, enfeoffed, and confirmed," certainly import a covenant in law, the effect and meaning of which would be affected by the subsequent words of the indenture. After the *habendum* to Thomas Browning, his heirs and assigns, follows this qualified warranty: "And the said James and his heirs, the aforesaid piece of land, &c. to the said Thomas Browning and his heirs, against him the said James and his heirs, shall and will warrant and for ever defend by these presents." This is not a general warranty against all mankind, but against the acts of James Wright and his heirs only. Then follow certain covenants in these words. "And the said James Wright for himself, his heirs and assigns, doth covenant and agree to and

with the said Thomas Browning, his heirs and assigns in manner and form following, that is to say, That he the said James Wright for, and notwithstanding any thing by him done to the contrary, is lawfully and absolutely seised of the said piece, &c. hereby granted of a good, sure, perfect, lawful, absolute, and indefeasible estate in fee-simple, without any manner of condition, limitation, use, trust, or any other restraint, matter, or thing whatsoever, to alter, change, charge, defeat, or determine the same." Then follows the covenant on which the present question arises: "And that he hath good right, full power, and lawful and absolute authority to convey and assure the same to the said Thomas Browning, his heirs and assigns, in manner aforesaid." After this comes a covenant concerning a right of way, which has no relation to this case, except that it may not be immaterial to observe, that this covenant is introduced by the words "And the said James for himself, his heirs, executors, and administrators, doth further covenant and agree," which are the initiatory words of the first covenant, and which are not used at the beginning of what is called the second covenant. Perhaps, this may be considered as a critical observation in a case which does not require it. But as what is called the second covenant is only introduced by the words "And that," and in the third (or what may be called the second) covenant, the name of the covenantor is again introduced as further covenanting, it seems to have been the intention of the parties that all the matters which are inserted before the repetition of the initiatory words should be considered as one covenant. This point, indeed, is not necessary to the decision of the case. But even on the critical *observation which I have suggested, it would not be unfair to hold that what has been stated at the bar as two covenants, is in fact but one. And if this were granted, there would be an end of the whole argument. The grantor then covenants for the quiet enjoyment of the grantee, "without any manner of let or interruption of the said James Wright, or any manner of person or persons claiming under him." So that it is clear, that this covenant does not apply to the acts of any persons not claiming under James Wright; and in this respect it agrees with the effect of the warranty, and with the words in the introductory part of

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the first covenant. The last covenant is, that James Wright, his heirs and assigns, and all persons claiming any estate or interest to, from, or under him (which tallies with the warranty, and with the introductory words to the first and last covenants), would make such further assurance as should be thought necessary. It is certainly true, that the words of a covenant are to be taken most strongly against the covenantor ; but that must be qualified by the observation that a due regard must be paid to the intention of the parties as collected from the whole context of the instrument. This transaction is a purchase of an estate of inheritance in fee, and the first question is, What will be the nature and effect of a conveyance carrying such a contract into execution ? If a man purchase an estate of inheritance and afterwards sell it, it is to be understood *primâ facie* that he sells the estate as he received it : and the purchaser takes the premises granted by him with covenants against his acts. If the vendor has taken by descent, he covenants against his acts and those of his ancestor ; and if by devise, it is not unusual for him to covenant against the acts of the devisor as well as his own. In fact, he says, I sell this land in the same plight that I received it, and not in any degree made worse by me. It was argued, that if this were so, a man who has only an estate for life, might convey an estate in fee, and yet not be liable to the purchaser. This seems at first to involve a degree of injustice, but it all depends on the fact, whether the vendor be really putting the purchaser into the same situation in which he stood himself. If he has bought an estate in fee, and at the time of the re-sale, has but an estate for life, it must have been reduced to that estate by his own act, and in that case the purchaser will be protected by the vendor's covenants against any act done by himself. But if the defect in his title depend upon the acts of those who had the estate before him, and he honestly but ignorantly proposes to another person to stand in his situation, neither hardship *or injustice can ensue. What is the common course of business in such a case ? An abstract is laid before the purchaser's counsel ; and though to a certain extent he relies on the vendor's covenants, still his chief attention is directed to ascertaining what is the estate, and how far it is supported by

the title. The purchaser, therefore, not being misled by the vendor, makes up his mind whether he shall complete his bargain or not, and if any doubts arise on the title, it rests with the vendor to determine whether he will satisfy those doubts by covenants more or less extensive. *Primâ facie*, therefore, in the conveyance of an estate of inheritance, we are led to expect no other covenants than those which guard against the acts of the vendor and his heirs. With respect to the conveyance of leasehold estates, this is not always so, and there is an obvious reason why this should not be so. Some of the cases rest on the distinction between freehold and leasehold property, and in the case† cited from that excellent book the Reports of Saunders, made more excellent by a late edition, the estate was leasehold. All the muniments of a freehold estate, and every thing which can illustrate the title is in possession of the vendor : but this is seldom the case with respect to leaseholds. With regard to many estates in this town, held under the Duke of Bedford and the Duke of Portland, it would be next to impossible to shew any thing but the lease itself ; the vendors could not produce the muniments of their estates which are deposited in the family chests of those noblemen. It sometimes happens, therefore, that parties require covenants in assignments of this kind of property which are not required in conveyances of freehold ; such as an absolute covenant that the vendor holds a valid and indefeasible lease.

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But even where covenants of this kind are introduced, if the words of the deed be that " he covenants in manner and form aforesaid," the Court will look to the former part of the instrument in order to ascertain the sense in which the covenant is to be taken. So in the case of *The Duke of Northumberland v. Errington* and others‡ where the defendants covenanted for themselves " jointly and severally in manner following," and the deed was so inaccurately drawn, that *primâ facie* some of the covenants appeared to be joint, and some several, the Court of King's Bench held, that the general intent of the parties was to be considered, and that the prior words extended to all the subsequent covenants, and made them all joint and several. In the

† *Gainsford v. Griffith*, 1 Saund. 60. ‡ 2 R. R. 666, 5 T. R. 522.

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present *case then we have got thus far. It is quite clear with respect to the warranty that it was not the intention of the grantor to warrant the title against any persons but himself and his heirs. It is equally clear, that it was not his intention to covenant for quiet enjoyment against the acts of any but himself and his heirs: nor was it his intention to make the covenant for further assurance extend to any other persons. We find all these limited covenants in an instrument of purchase, in which we should not expect obligations of greater extent. Then there is one part of the instrument which, if it be taken as a substantive unconnected covenant, and not part of the first covenant, which, however, I think might be done, raises the present question. It has been argued, that this demurrer cannot be allowed without laying down this principle; that any special covenant in a deed will restrain all the general covenants. If that consequence would necessarily ensue, I admit, that the demurrer is not to be sustained. But I take that to be an inaccurate statement of the case. The question is not whether a special covenant will restrain a general one, but whether the particular covenant on which the action is founded be general or special. And my opinion, upon considering the whole deed, is, that it is a special one. What would be the use of any of the other covenants if this were general? It would be of little service to the grantor to insist that the warranty, and the covenants for quiet enjoyment and further assurance were specially confined to himself and his heirs, if the grantee were at liberty to say, "I cannot sue you on these covenants, but I have a cause of action arising upon a general covenant which supersedes them all." It appears to me from the words and context of the deed, that in such case we should be driven to say, that the grantor intended at the same time to give a limited and an unlimited warranty. The true meaning, therefore, of the covenant is, that the grantor has power to convey and assure according to the terms used, to which terms he refers by the words "in manner aforesaid;" namely, "for, and notwithstanding any thing by him done to the contrary."

With respect to the cases which have been cited, it is to be observed, that when a general principle for the construction of

an instrument is once laid down, the Court will not be restrained from making their own application of that principle, because there are cases in which it may have been applied in a different manner. The principle being once acknowledged, the only *difficulty consists in making the most accurate application of it. In *Trenchard's* case,† the estate on which the covenants in question arose was granted under letters patent by the Crown; but those letters patent are not stated in any of the reports. We know, however, that in grants of lands by the Crown, it is usual to reserve a reversion, which reversion the grantee cannot bar. The grantee having enjoyed the estate for a considerable time, sold to the plaintiff in the action, and entered into three covenants. First, that he was seised in fee: secondly, that he had good power to convey: and, thirdly, that there was no reversion in the Crown notwithstanding any act done by him. The contest in the cause was to apply the concluding words of the third covenant to the two prior covenants; there was a great difference of opinion upon the subject, not only between the individual Judges, but between the different Courts before whom it was argued; and the only ground upon which I can suppose that Court to have proceeded, which decided that the words were not connected with the first covenant, is this, that they considered it to have been the intention of the parties that the vendor should enter into an absolute covenant for his seisin in fee in all cases but one; namely, that he should not be liable on the objection of a reversion existing in the Crown, unless that reversion appeared to have been vested in the Crown by his own acts. The case of *Johnson v. Proctor*,‡ in Yelverton, proceeded on the principle on which this demurrer may be decided, viz. that the covenant is to be construed according to the intention of the parties. There the grantor having stated in the recital that he was interested in the whole of the premises, when in fact he was interested in a moiety only, the Court would not permit him to contend that a covenant for quiet enjoyment “notwithstanding any act done by him,” was satisfied by a compliance with the mere words of that covenant in a case where the grantee had suffered eviction, not in consequence of any act done by the grantor, but in consequence of the badness of his title. The recital itself amounted

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† *Trenchard v. Hoskins*, Winch, 91—93.

‡ Yelv. 175.

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to a warranty. *Gainsforth v. Griffith*† was a case of leasehold property. The first covenant there was, for an indefeasible title, and was a separate and distinct covenant; and the second was for quiet enjoyment, notwithstanding the assignor's own acts. He seems, therefore, to have said, I not only covenant for the goodness of my title, but that you shall enjoy under that title without any interruption from me. The nature of the assurance shews it to have been the intent of the parties that the *words in the last covenant should not attach upon the first. Coming lately from a court of equity, I may be allowed to refer to a case there, though perhaps not of the highest authority in a court of law. It is the case of *Fielder v. Studley*, Cas. temp. Finch, 90. There the deed contained one general covenant for lawful power to convey, but all the other covenants had restricted words as here. The grantee having sued the grantor on the general covenant, the Court of Chancery restrained him from proceeding. Now this must have been done on the ground of the intent of the parties appearing on the instrument; since that intent, and the consequent legal effect of the instrument, could only be collected from the instrument itself, and not from any thing *dehors*. In the same manner the intent of the parties to the covenant on which this action is brought, is to be collected from the warranty, from the other covenants, and from the *prima facie* nature of a purchase of a freehold estate. Upon the whole I am clearly of opinion, that this is not a covenant against all the world, but that it is either part of the first covenant which is special, or if a substantive covenant must, by reference to the whole context of the deed, be considered a special covenant.

BULLER, J. :

My lord has so completely exhausted the case that I need do little more than subscribe my general assent. Some things are extremely clear. In the construction of agreements and covenants, the intention of the parties is principally to be attended to. In conveyances of this sort, the usage of the profession also deserves considerable attention. According to the ancient mode of conveyance, deeds were confined to a very narrow compass.

† 1 Saund. 60.

The words "grant and enfeoff" amount to a general warranty in law, and have the same force and effect. The covenants, therefore, which have been introduced in more modern times, if they have any use besides that of swallowing a quantity of parchment, are intended for the protection of the party conveying; and are introduced for the purpose of qualifying the general warranty which the old common law implied. This has been clearly settled ever since *Noke's* case.† We do not do justice to the parties unless we look to the whole deed, and infer from that their real intention. Covenants being intended for the benefit of the party conveying, let us see how this defendant has protected himself. He has expressly told us in one part of the deed that he means to covenant against his own acts, and are we to say, that he has in the same breath covenanted against the acts of all the world? This would be highly *inconsistent. If the Court is driven to say that these two covenants must stand together, they must do so by pronouncing judgment on the words of this particular clause, and shutting their eyes against all the other parts of the deed. I am inclined to think that the person who drew this deed intended that the two clauses should form but one covenant: but that not having strength of mind sufficient to carry him through one continued sentence of so great a length, he stopped, and introduced the words "And that," which have created all the difficulty. Strike out these words and the case is as clear as the sun. The covenant would then stand thus: The grantor covenants that notwithstanding any act done by him, he is seised of the estate, and hath good title to convey. The two clauses are synonymous. Many words have been used, though they mean but one thing. The grantor has said I have a good right to convey. Take this to be against all the world. He has also qualified the assertion that he is seised in fee by the expression "notwithstanding any act by him done;" why say notwithstanding any act by him done, if he meant to covenant against the acts of all the world? The restriction would be inconsistent. To make sense of the deed, therefore, we must read these two sentences as one covenant. It is often difficult to distinguish between the words of the conveyancer, and those of the party

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† 4 Co. Rep. 80.

BROWNING ^{v.} WRIGHT. conveying. In this case, however, I think it may fairly be inferred that the grantor intended only to sell what he had bought, leaving it to the purchaser to exercise his discretion respecting the title.

HEATH, J. :

I am of the same opinion ; and shall express my reasons for that opinion very shortly. I take this case to be very clear on the construction of the instrument. Where any sentence contains distinct covenants, and there are words of restriction either in the prefatory or concluding part, those words must be extended to every part of the sentence unless the intention of the parties appear to require a contrary construction. This is laid down in 1 Saund. 60. It therefore behoves the plaintiff to shew that it was the intention of the parties that the restrictive words in this case should not extend to the second clause of the sentence. It is certainly possible that this might have been the intention. The purchaser might have entertained suspicions of the title, and might therefore have required a general covenant. But in order to ascertain whether this were so, we must examine the other parts of the deed ; and the other parts of the deed negative that idea. The second *clause is consequential to the first. The first asserts, that the grantor is seised of an estate in fee, notwithstanding any act done by him ; and the second, that he has good right to convey the estate of which he is seised.

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ROOKE, J. :

I have entertained some doubts upon this question : but upon the whole of the argument, I am now satisfied that the judgment of the Court must be directed by the intent of the parties ; and that the intent sufficiently appears. But as the case has been very fully discussed, I shall only add, that the two clauses appear to me to constitute but one covenant, and that the restraining words must be applied as well to that member of the sentence which asserts that the grantor is lawfully seised, as to that which asserts that he has a right to convey.

Judgment for the defendant.

COOK v. LOVELAND AND ANOTHER.

(2 Bos. & P. 31—35.)

1799.
Nov. 18.

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The Crown by letters patent granted to the master and wardens of the corporation of bakers (there being four wardens), by themselves and their deputy or deputies, full power to overlook and correct the trade of baking. Held, that the master and one warden could not justify entering the house of a baker to overlook bread; for if they acted as principals, they did not amount to a majority of the persons to whom the power was given; and if they acted as deputies, it should have appeared that they were appointed by the majority.

TRESPASS for breaking and entering the dwelling-house of the plaintiff, situate in Commerce Row, Blackfriars Road, in the parish of Christchurch, in the county of Surrey, and continuing therein a long space of time, to wit, the space of one hour, and throwing about, pulling about, and damaging divers loaves of bread of the said plaintiff in his dwelling-house, &c.

Pleas. First, Not-guilty. Second, As to the said breaking and entering the said dwelling-house of the said plaintiff, in the said declaration mentioned, and continuing there ten minutes, parcel of the said term, in the said declaration mentioned; and as to the throwing about and pulling about the said loaves of bread in his said dwelling-house in the said declaration mentioned the said Thomas and John by leave, &c. *actionem non*, because they say that the said plaintiff before and at the time when, &c. used and exercised the trade and mystery of a baker, baking bread to be exposed to sale, and exposed bread to sale at his said dwelling-house at the parish aforesaid, in the county aforesaid, and that the said dwelling-house of the said plaintiff, wherein he so used and exercised the trade and mystery of a baker, and made bread and exposed the same to sale, is situate within two miles of the suburbs of the city of London, and is not situate * within the city of Westminster, or the liberties thereof: And the said Thomas and John further say, that the late sovereign Lady Elizabeth Queen of England, by her letters patent bearing date the 26th May, in the eleventh year of her reign, for herself, her heirs and successors, ordained, that all the freemen of the city of London of the art or mystery of bakers, in the said city of London, and all the freemen of the said city, as well of the white

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bakers, as of the brown bakers, and all others occupying or using within the said city or its suburbs, or any of them, the mystery or art of baking any bread of any sort to be exposed to sale for the regulation and ordering of the said art or mystery, from thence for ever should be, by virtue of the said letters patent, a body corporate and politic, in deed, fact, and name, by the name of the master, wardens, and commonalty of the mystery of bakers of London, and from thence for ever, should by that name have perpetual succession, sue and be sued, and have a common seal: And the said Queen did by the said letters patent for herself, her heirs and successors, grant to the said master, wardens, and commonalty, or their successors, that from thenceforth for ever there should be one master of the said mystery and four guardians thereof to be chosen, named, and appointed as in the said letters patent is more fully set forth: And the said Queen did further of her free grace, certain knowledge, and mere motion, will, and by the said letters patent, grant for herself, her heirs, and successors, to the said master, wardens, and commonalty, and their successors, that the master and wardens for the time being, and their successors for ever, should have, enjoy, and exercise by themselves or their sufficient deputy or deputies within the said city and the suburbs thereof, and in all other places within two miles everywhere round the suburbs of the said city of London, the full and entire overlooking, examination, correction, punishment, and government of the said mystery and commonalty of freemen of the said mystery, and of all other freemen of the said city of London and suburbs thereof, and of all and singular other strangers, as well within as without the said suburbs, using the art or mystery of bakers, making and exposing to sale any sort of bread within the said city or the liberties and suburbs thereof, and of all other strangers, of what sort soever, in any way exercising or using the art and mystery of a baker within the said city and suburbs, or any of them, or elsewhere, in any other place not distant more than two miles from the suburbs of the said city of *London, (the said Queen's city of Westminster, and the liberties thereof only excepted,) according to their sound discretion as by the said letters patent now remaining of record in his

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Majesty's High Court of Chancery at Westminster, reference being thereunto had, may more fully appear, which said letters patent were afterwards and after the granting thereof (to wit) on the same day and year as aforesaid by the persons to whom they were directed, accepted, that is to say, at the parish aforesaid, in the county aforesaid. And the said Thomas and John further say, that before, and at the time when, &c. the said Thomas was master of the said mystery, and that one Andrew Wright was one of the wardens thereof, to wit, at, &c. And the said Thomas and John further say, that the said Thomas and the said Andrew Wright being such master and warden of the said mystery, and the said plaintiff so exercising and using the art or mystery of a baker as aforesaid, they the said Thomas and the said Andrew Wright for the purpose of overlooking the said plaintiff in his said art and mystery of a baker, and of examining whether the bread by him baked and exposed to sale in his said dwelling house was of a proper and sufficient weight according to law, and the said John as their servant in their assistance, and by their command, at the said time, when, &c. entered the said dwelling-house of the said plaintiff, situate in the parish and county aforesaid, in which he so used and exercised his art and mystery of a baker, and exposed bread so by him baked to sale, and then and there took down, and took hold of, and weighed parcel of the said bread, so being there exposed to sale, as they lawfully might for the cause aforesaid, and in so doing did necessarily stay and continue the space of ten minutes in the said dwelling-house as they lawfully might for the cause aforesaid, which are the said trespasses in the introductory part of this plea set out. And this, &c. wherefore, &c.

To this there was a general demurrer and joinder.

Runnington, Serjt. in support of the demurrer :

* * Thirdly, the authority has not been strictly pursued. The charter created one master and four wardens, and the authority is to be executed by the master and wardens for the time being "by themselves or their sufficient deputy or deputies;" admitting therefore, that a majority of five might have exercised the authority, yet the trespass in this case being only

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 LOVELAND, justified as the act of the master, one of the wardens and a third person in their aid, the justification is insufficient. Nor can these persons be considered as deputies of the five, since if there was a deputation, it should have appeared to have been made by the concurrent appointment of the five, or at least of the majority. In 1 Bulst. 105, where a writ was directed to eight *nominatim*, and seven only certified, it was held to be bad.

Shepherd, Serjt. *contrà*, was desired by the Court to argue the last objection, as they should not feel themselves called upon to decide upon the others, if that was well grounded. He [*35] admitted *that where a power is granted to a definite number of persons, it must be exercised by the majority, but contended, that the defendants in this case acted ministerially as the agents and servants of the master and wardens, that they entered the plaintiff's house with a view to overlook only, and that their act was afterwards to be submitted to the judgment of the majority of persons to whom the power was granted; that it might be collected from the plea that they were only acting as deputies of the others, and that although no deputation was averred, such omission could only be taken advantage of on special demurrer.

But the COURT were of opinion, that the omission was a subject of general demurrer, for the authority was void if the de utie were not well appointed.

LORD ELDON, Ch. J. :

This declaration calls upon the defendants to shew by what authority they entered the plaintiff's premises. The plea refers to the letters patent of incorporation, and asserts that the defendants had authority in manner and form therein described ; that is, a right of overlooking and correcting the trade. Now, it is obvious, that on a question, whether bread be wholesome and sound, persons may differ in opinion, and a tradesman is not to be subject to the judgment of a single person, where the authority is vested in several. With respect to the right of exercising that authority by deputy, the same joint discretion must be employed

in appointing the deputy which is necessary to the execution of the authority itself.

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Per CURIAM :

Judgment for the plaintiff.

JORY v. ORCHARD.

(2 Bos. & P. 39—42.)

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If a plaintiff's attorney previous to bringing an action for a distress under the warrant of a magistrate, make out two papers precisely similar, purporting to be demands of a copy of the warrant pursuant to statute and sign both for his client, and then deliver one to defendant, the other will be sufficient evidence at the trial.

TRESPASS for taking and driving away the plaintiff's cattle. The cause was tried before GROSE, J. at the last Summer assizes for Cornwall, when it appeared that the defendant took the cattle as a distress for non-payment of a poor-rate, by virtue of a warrant from a magistrate, which was produced and read. The counsel for the defendant then called on the plaintiff to prove a demand of a copy of the warrant pursuant to 24 Geo. II. c. 44, s. 6,† upon which a paper was produced by a witness, who swore that it was a copy of the demand of the warrant. It was objected, however, that such copy could not be read in evidence without proof of notice given to the defendant to produce the original: in answer to which, it was shewn, that the plaintiff's attorney intending to deliver a demand under the above Act, made out two papers for that purpose precisely to the same effect, and signed them both for his client; one of which he delivered to the defendant, and the other, which was the paper now produced, he kept in his own possession. This the learned Judge refused to receive,

† That section enacts, "that no action shall be brought against any constable, headborough, or other officer, or against any person or persons acting by his order and in his aid, for anything done in obedience to any warrant under the hand or seal of any Justice of the Peace, until demand hath been made or left at the usual place of his

abode by the party or parties intending to bring such action, or by his, her, or their attorney or agent in writing, signed by the party demanding the same, of the perusal and copy of such warrant, and the same hath been refused or neglected for the space of six days after such demand."

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because no notice had been given to produce the demand delivered to the defendant, which he thought the best evidence; accordingly he directed a nonsuit.

A rule *nisi* having been obtained upon a former day for setting aside this nonsuit,

Bayley, Serjt. now shewed cause :

[He contended that the demand left with the defendant ought to have been produced, or notice given to produce it.]

Lens, Serjt. in support of the rule :

[40] The question is, whether the paper produced were in fact a copy, or whether it were not as much an original as that delivered to the defendant. The analogy to be drawn from the case of a man writing two letters precisely to the same effect, signing both, and sending one to his correspondent, and retaining the other, is in favour of the plaintiff, for I contend, that the letter so retained would be of equal validity with that which was sent. Here two originals were created, one of which was delivered to the defendant, and the other was kept for the purpose of being made evidence. It is like the case of a notice to quit, where a duplicate is always admitted as evidence.

LORD ELDON, Ch. J. :

[*41] With respect to the only question which arose at *nisi prius*, namely, whether this paper is to be considered as a copy of the original notice, or as a duplicate original, the strong inclination of my opinion is, that it is a duplicate original which, under the circumstances of the case, afforded evidence *enough for the plaintiff to insist that the trial should proceed. I have looked into the Act of Parliament with a view to discover a ground on which any distinction may be founded between the notice required by the first section, to be given to justices of the peace previous to the commencement of an action against them, and the demand required by the sixth section; but without success. Unless I am mistaken, it is the usual course in actions against justices of the peace to produce a duplicate original; and the same thing is done with respect to notices to quit. It is true, that a

notice to a justice of the peace need not be signed either by the plaintiff or his attorney; though on the back of it the name and place of abode of the attorney must be indorsed; but it must have certain specified contents, and the production of a copy, or duplicate of that notice therefore is not the very best evidence to prove that the notice had the contents specified in the Act. So a duplicate of a notice to quit is not the very best evidence of the contents of the notice delivered; for in that case also the contents may be proved to a certainty by the production of the notice itself, and the supposed duplicate original may be inaccurate. I do not see on what ground the distinction between those cases and this can be supported, the plaintiff having shewn, that the paper produced was signed in the manner required by the Act. The practice of allowing duplicates of this kind to be given in evidence, seems to be sanctioned by this principle, that the original delivered being in the hands of the defendant, it is in his power to contradict the duplicate original, by producing the other if they vary. We cannot hold the paper produced in this case to be insufficient, without overturning the practice in actions against magistrates, and in cases of notices to quit, unless I mistake as to what that practice is—conceiving it to be as I have stated, I think this nonsuit cannot be supported.

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BULLER, J. :

I am confident that this question has often arisen and been decided at *nisi prius*. But points of this kind pass unnoticed unless afterwards moved in Court. The attorney in this case made two copies of the paper, one of which he meant to deliver; he signed both, and it was indifferent which of them he delivered, for they were both originals. It appears clearly from the report that the nonsuit was directed on the ground of the paper produced in evidence being a copy; but I think it clear, that both the papers were originals. With respect to the second point, I agree with my brother *Bayley*, that if any thing appear upon the report which would be the cause of a nonsuit at the second trial, the Court will take it into *consideration, though not expressly reserved. But the statute in question not being a penal Act, the Court are not bound to construe it strictly. I think,

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therefore, the demand being signed by the plaintiff's attorney for him, is within the meaning of the statute, a demand signed by the plaintiff.

HEATH, J. :

I am of the same opinion. In principle I cannot distinguish this case from that of a duplicate notice to quit, which is received in evidence.

ROOKE, J. :

I confess, that I cannot make up my mind to agree with my Lord Chief Justice and my brothers. The Act requires this demand to be signed. In the other cases which have been mentioned, both the notice delivered, and the duplicate retained, may be considered as originals. But here something more is to be done beyond the mere production of the paper ; the signature is to be proved ; and how that is to be proved, by shewing that another paper was signed by the party, I do not perceive. I think that the plaintiff should have given notice to produce the original demand before he could entitle himself to give the counterpart in evidence.

Rule absolute.

C. P. HILARY TERM.

1800.
Jan. 27.

KIDD v. RAWLINSON.

(2 Bos. & P. 59—61.)

[59]

The goods of A. being taken in execution and put up to sale, B. became the purchaser and took a bill of sale of the sheriff, but permitted A. to continue in possession ; A. then executed another bill of sale of the same goods to C. a creditor, under which the latter took possession ; whereupon B. brought an action against C. for the goods. Held, that the first bill of sale was valid, and that B. was therefore entitled to recover.†

THIS was an action for money had and received.

An execution having issued against the goods of one Aburn

† For a modern case in which the principles of the common law as to bills of sale are discussed, see *Cookson v. Swire* (1884) 9 App. Ca. 653 ; 54

L. J. Q. B. 249, particularly the opinion of Lord Blackburn, 9 App. Ca. p. 664.—R. C.

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who kept a public house, his furniture was taken and put up to sale by the Sheriff of Surrey; the plaintiff, who was Aburn's brother-in-law, but not a creditor, became the purchaser, and a bill of sale was made out to him, dated 13th of November, 1798; Aburn was by him permitted to continue in possession of the goods in order that he might be able to carry on his business, but being soon after taken in execution and committed to prison, he executed a bill of sale of them, dated 11th of March, 1799, to the defendant, to whom he was indebted in the sum of 16*l.* 5*s.*; the defendant having taken possession under this last bill of sale, received a notice from the plaintiff not to dispose of the goods, stating his prior title; on the 14th of March the landlord of the premises authorised the defendant to distrain to the amount of 12*l.* 10*s.* for rent due from Aburn for two quarters, which the defendant accordingly paid, and on the 26th of the same month sold the goods for 26*l.* 14*s.* 6*d.* The expenses of the bill of sale to the defendant, of keeping possession, and of the auction added to the rent advanced by the defendant, amounted to 26*l.* 4*s.* 8*d.*; leaving a balance of 9*s.* 10*d.*; this being deducted from the debt due from Aburn to the defendant, the latter still remained a creditor of the former for 15*l.* 15*s.* 2*d.* The cause being tried before Lord ELDON, Ch. J. at the Westminster sittings after last Michaelmas Term, his Lordship put it to the jury to say, Whether the plaintiff had purchased the goods with a view to defeat any execution by any of the creditors of Aburn? And the jury being of opinion that the purchase was not made with that view, gave him a verdict for 14*l.* 4*s.* 6*d.*

Marshall, Serjt. now moved for a rule *nisi* to set aside this verdict and enter a nonsuit: he contended that the bill of sale to *the plaintiff not having been accomplished and followed by possession, was fraudulent and void, and cited *Edwards v. Harben*, 2 Term Rep. 587,† and *Bamford v. Baron* in a note to that case.

[*60]

LORD ELDON, Ch. J. :

This action was brought to recover the produce of the sale

† 1 R. R. 548.

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RAWLINSON. made by the defendant after deducting the amount of the rent paid to the landlord. It is to be observed that the plaintiff was not a creditor of Aburn, and did not buy the goods as the means of satisfying any debt of his own; nor indeed could he, for the sheriff was to receive the money produced by the sale: nor was the purchase made with a view to defeat creditors, but out of mere kindness to Aburn to whom the plaintiff was related. If, under these circumstances, the possession of Aburn be sufficient to make the bill of sale fraudulent, the plaintiff must suffer the legal consequences of his benevolent disposition. But it appears to me that this does not fall within the principle of *Twyne's*† case, and the other cases on this subject, where the parties stood in the relation of debtor and creditor, and where their object was to defeat the other creditors. This seems to me a new case; for here the goods were purchased at a public sale by a person who had never acquired the character of a creditor, and were then lent to the original owner for a temporary and honest purpose. If Kidd had lent money to Aburn to buy these goods, and had then taken a conveyance of them, or a security for his debt thus arising out of the mere act of lending the money; leaving Aburn in possession of the goods would not have been a fraudulent act. This appears from Mr. J. Buller's Law of Nisi Prius, p. 258, who after stating a case of conveyance which was holden to be fraudulent because the donor continued in possession, adds, "but yet the donor continuing in possession is not in all cases a mark of fraud; as where a donee lends his donor money to buy goods, and at the same time takes a bill of sale of them for securing the money." It will be difficult to distinguish the transaction in question from this case. Indeed a public buying of the sheriff seems to be more favourable to the plaintiff. It appeared to me at the trial that Kidd might be considered as the donee of these goods lending money to Aburn to purchase them through the medium of the Sheriff, and taking a bill of sale as a security for the money. I desired the jury to say what they considered to be the object of the bill of sale; and they were of opinion that it was the intention of the parties that the bill of sale should be a security for the money advanced to the Sheriff.

† 3 Co. Rep. 80.

HEATH, J.:

KIDD

I see no reason for setting aside this verdict. The *case is clearly distinguishable from *Twyne's* case, there being great notoriety in the whole of this transaction. Now it is to be observed, that Lord Coke in *Twyne's* case recommends that gifts in satisfaction of a debt by one who is indebted to others also, should be made in a public manner before the neighbours and not in private; for secrecy is a mark of fraud. Here there was no fraud or secrecy, and therefore I think the consequences would be mischievous if this plaintiff's title were defeated.

RAWLINSON.

[*61]

ROOKE, J.:

I am of the same opinion.

Marshall took nothing by his motion.

ENGLISH v. DARLEY.

(2 Bos. & P. 61—62.)

1800.

Jan. 27.

If the indorsee of a bill having sued the acceptor to judgment, and taken out execution, receive of him a sum of money in part payment, and take his security for the remainder, with the exception of a nominal sum only; he is thereby precluded from afterwards suing the indorser.

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ASSUMPSIT by the indorsee of a bill of exchange against the indorser.

Lord ELDON, Ch. J. before whom the cause was tried at the Westminster sittings after last Michaelmas Term, nonsuited the plaintiff under the following circumstances: Payment of the bill being refused when due, the plaintiff commenced actions against the present defendant and the acceptor, and having sued the latter to judgment, took out execution thereon; but although the acceptor had sufficient to answer the execution, the plaintiff at his instance received 100*l.* in part payment of the bill, and took his bond and warrant of attorney as a security for the payment of the remainder by instalments, together with interest and costs, excepting only a nominal sum, with a view to enable him,

ENGLISH the plaintiff, to support actions against the other parties to
 v. the bill.
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[*62] *Shepherd* and *Lens*, Serjts. now moved for a new trial, and contended that the holder of a bill of exchange after due notice given of non-payment is entitled to sue all or any of the parties whose names are on the bill ; and that although he receive from any one of them what may amount to a satisfaction as against him, yet that the others will not be discharged until the whole amount of the bill be paid ; as in *Macdonald v. Borington*, 4 Term Rep. 825, where the holder of a bill having sued the acceptor and charged him in execution, he was allowed to sue the drawer on the acceptor being discharged by an insolvent act ; and in *Hayling v. Mulhall*, 2 Bl. 1235, where it was laid down that the holder after having discharged one of the indorsers, whom he had taken in execution, *by a letter of licence, might sue a prior indorser. They insisted that each of the parties to the bill was in the nature of a co-surety, and therefore nothing short of actual payment by one of them could be considered as a satisfaction in an action against any of the others, and cited *Dyke v. Mercer*, 2 Show. 394.

LORD ELDON, Ch. J. :

It is very clear that the holder of a bill may at his election sue any or all the parties to it, and that if they all become bankrupt, he may prove against the estates of all, unless he receive part of the debt from any one. And although the debt be reduced from time to time by dividends, no part of the proof shall be expunged under any of the commissions till 20s. in the pound have been received. As long as the holder is passive, all his remedies remain ; and if any of the parties be discharged by the act of law, as by an insolvent debtor's act, that operation of law shall not prejudice the holder. With respect to *Hayling v. Mulhall*, it may be observed that the marginal abstract of that case is incorrect ; for it appears from the report that the person first sued was a subsequent indorser : had the plaintiff first sued a prior indorser and discharged him from execution, it would have afforded a sufficient objection to an action against a subsequent

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indorser. If a holder enter into an agreement with a prior indorser in the morning not to sue him for a certain period of time, and then oblige a subsequent indorser in the evening to pay the debt, the latter must immediately resort to the very person for payment to whom the holder has pledged his faith that he shall not be sued. In the case *Ex parte Smith*† Lord THURLOW, after consulting with all the Judges, was of opinion, that the holder of a bill by entering into a composition with the acceptor discharged the indorser, and accordingly ordered the proof against the estate of the latter to be expunged, proceeding on the ground of the acceptors' liability being varied by the act of the holder. We all remember the case where Mr. Richard Burke being co-surety for an annuity, the grantee gave time to the principal, and yet argued that Mr. Burke was not relieved thereby, though the principal was; but it was answered that the grantee could make no demand upon the co-surety, because he must by so doing enforce a payment from the principal contrary to the agreement. Here the plaintiff having taken a new security from the acceptor, has discharged the defendant.

HEATH and ROOKE, JJ. were of the same opinion.

Shepherd and *Lens* took nothing by their motion.

Note.—This case, although it might have been placed in the category of settled law, is retained as an early authority upon the principle of release of the surety by an arrangement which gives time to the principal. The more recent and leading cases are *Oakley v. Pasheller* (1836) 10 Bl. N. R. 548; and *Overend Gurney & Co. v. Oriental Financial Corp.* (1871) L. R. 7 Ch. 142, 41 L. J. Ch. 342, and (1874) L. R. 7 H. L. 348. The leading and recent cases, on the other hand, showing that this may be avoided by an express reservation of the rights against the surety, are *Owen v. Homan* (1853) 4 H. L. C. 997; *Muir v. Crawford* (1875) L. R. 2 H. L. Sc. 456; and *Jones v. Whitaker* (C. A. 1887) 57 L. T. 216.—R. C.

† Co. B. L. 168, 172, Ed. 4.

1800.
Feb. 5.

[86]

THE KEEPERS AND GOVERNORS OF THE POSSESSIONS, &c., OF HARROW SCHOOL *v.* ALDERTON.

(2 Bos. & P. 86—88.)

In an action of waste on the statute of Gloucester against tenant for years, for converting three closes of meadow into garden ground, if the jury give only one farthing damages for each close, the Court will give the defendant leave to enter up judgment for himself.†

THIS was an action of waste on the statute of Gloucester, for ploughing up three closes of meadow-land, and converting the same into garden-ground, and building thereupon, to the damage of the plaintiffs of 500*l.* Plea, Not guilty.

The cause was tried before Heath, J. at the Westminster sittings after last Trinity Term, when the jury found a verdict for the plaintiff with three farthings damages, being one farthing for each close.

In the Michaelmas Term following, *Cockell*, Serjt. obtained a rule, calling on the plaintiff to shew cause why the judgment should not be entered up for the defendant, on account of the smallness of the damages recovered, on the principle that *de minimis non curat lex*; and cited in support of the application Bro. Abr. tit. Waste, pl. 123; Co. Lit. 54, a, 2 Inst. 306; Cro. Car. 414, 452; Finch's Law, lib. 1, cap. 3, s. 34, adopted 3 Black. Com. 228; Vin. Abr. tit. Waste N. and Buller's N. P. 120.

Shepherd, Serjt. now shewed cause:

There are two species of waste: that which consists in the abuse of the thing in which the waste is committed, and the consequent deterioration of its value, and that which changes the nature of the thing itself. In waste of the first kind, if the damage be very small, it may be right that no action should lie, because the deterioration is the offence of the waste. But where the waste consists in the alteration of the property, that altera-

† The principle embodied in this case is recognised by the opinions of Lord O'HAGAN and Lord BLACKBURN in the House of Lords in *Doherty v. Allman* (1878), 3 App. Ca. 709, 725, 733, as a guide for the exercise

of the discretion of the Court in an injunction to restrain waste. It is doubtless a guide for the exercise of the discretion of the Court as to costs under the modern rules.—B. C.

tion is the essence of the waste. If then the amount of pecuniary damage be the criterion of this kind of waste also, the distinction will no longer exist; for it will then be the deterioration of value, and not the alteration of the property which will constitute the waste. It is clear that "if the tenant convert arable land into wood, or *è converso*, or meadow into arable, it is waste; for it changeth not only the course of his husbandry, but the evidence of his property." Co. Lit. 53 b, though it be for the advantage of the lessor, Dyer, 35 b, Hob. 284, 2 Leon. 174, per Periam, J. and Owen 67. All the cases in which the rule contended for has prevailed, have been cases of deterioration of property; and though the Court will not allow the judgment to be entered for *the plaintiff where the damages in such a case are small, yet though the damages be small in this case, where the nature of the property itself has been changed, they will not deprive the plaintiffs of a judgment by which they are entitled to recover the land.† The observation of Bracton, lib. 4, c. 18, s. 12, fol. 316 b, that "*vastum erit injuriosum nisi vastum ita modicum fuerit, propter quod non sit inquisitio facienda*," seems to be confined to cases of deterioration; for he is there only speaking of the tenant, who, in taking "*estovers, si mensuram excedat utendo et capiendo ultra rationabile estoverum suum, utitur quasi in alieno*." It is also to be observed, that where waste is found to have been committed in several places, the plaintiff is entitled to recover the thing wasted, notwithstanding the smallness of the damages, 14 H. IV. 11, b, Bro. Abr. tit. Waste, pl. 70.

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† By the statute of Gloucester, 6 Ed. I. c. 5, if tenant for life or years do waste, he shall forfeit the place wasted, and treble damages; if a guardian, he shall forfeit his wardship, and shall render damages to the heir if the wardship forfeited be not sufficient to satisfy the damages. In Hil. 34 Ed. III. an infant having brought waste against his guardian, damages were found to the value of twenty-one pence; and it was contended, that for the smallness of the value it should not be adjudged waste. The Court upon great consideration awarded "that the plain-

tiff should recover the wardship, &c. without damages, because the wardship was worth more than the damages of the place wasted." Fitz. Abr. Waste, pl. 146. It does not, however, necessarily follow from this case, that where small damages are found against tenant for life or years, the plaintiff shall recover the place wasted, without damages; and indeed it was laid down so early as Pasch. 8 Ed. II. that in such case the Court can never award one without the other, Fitz. Abr. Waste, pl. 111.

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LORD ELDON, Ch. J. :

I confess, that when this application was first made, I was not aware, that under the circumstances of the case the defendant was entitled to demand judgment: but my brother HEATH has satisfied me that the application is supported by the current of authorities. I do not indeed see precisely on what ground those decisions have proceeded; though I can easily conceive many cases in which it may be extremely unconscientious for a plaintiff to take advantage of his judgment, where such small damages have been recovered as in this case. As, if the owner of land suffer his tenant to lay out money upon the premises, and then bring an action of waste to recover possession when the land may have been improved to ten times the original value. The cases do not appear to authorize the distinction contended for by my brother *Shepherd*. Whether the waste committed be by alteration of the property, or by deterioration, still the jury, in estimating the damages, take into consideration the injury which the plaintiff has sustained; and in this case the jury have estimated the damage which these plaintiffs have sustained, by the alteration of their *property, at three farthings only. The courts of common law seem to have entertained a sort of equitable jurisdiction in cases of this kind.

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HEATH, J. :

This doctrine prevailed as early as the time of Bracton, who wrote before the statute of Gloucester. With respect to the distinction taken, there is no reason why pecuniary damages should not be assessed for the alteration of property as well as for the deterioration. Thus, if a tenant convert a furzebrake in which game have bred into arable or pasture, by which its real value would be improved, but its value to the landlord depreciated, it would be the business of the jury to assess damages to the landlord thereon.

ROOKE, J. :

I am of the same opinion.

Rule absolute.

AUDLEY v. DUFF.

(2 Bos. & P. 111—116.)

1800.
Feb. 10.

[111]

Policy on the *Ceres* "at and from Oporto to Lynn, with liberty to touch at any ports on the coast of Portugal to join convoy particularly at Lisbon; at 12 guineas per cent. to return 6*l.* if she sail with convoy from the coast of Portugal and arrive." The *Ceres* sailed from Oporto with a sloop and cutter appointed to protect the trade of that place to Lisbon, from whence it was to proceed with the Lisbon trade under a larger convoy for England. On the way from Oporto to Lisbon the fleet was dispersed by a storm, and the *Ceres* judging for the best, run for England and arrived. Held that the assured was entitled to a return of premium.

THIS was an action for return of premium. The policy was on the ship *Ceres* "at and from Oporto to Lynn, with liberty to touch at one port before Lynn, to deliver wines, and to proceed and sail to and touch and stay at any ports or places whatsoever on the coast of Portugal to join convoy particularly at Lisbon; " with this clause on which the present question arose, "at the premium of twelve guineas per cent. to return 6*l.* if the *Ceres* sail with convoy from the coast of Portugal and arrive."

The cause was tried before Lord Eldon, Ch. J. at the Guildhall Sittings after Michaelmas Term, when the following circumstances appeared in evidence.—Lord St. Vincent having the command on the Lisbon station, and finding himself unable to afford separate convoys for England to all the ports upon the coast of Portugal, directed the *Speedy* cutter and *King's-fisher* to go to Oporto and convoy the trade of that place from thence to Lisbon, where they were to lie in the Bay Doyras, without entering the port of *Lisbon, so as to become chargeable with the Lisbon duties. From that place the *Romulus*, *Argo*, and *Alliance* were ordered to convoy the whole trade on their way to England; and off the Scilly Isles the *Romulus* was to leave them, and protect the ships bound for Ireland to their place of destination. The Oporto fleet in proceeding to Lisbon being dispersed, lost the convoy, and the *Ceres* then judging for the best, run for England and arrived. At the time when the captains of the Oporto trade left that port, they conceived that they were to proceed direct for England, and did not learn the contrary until they received their sailing instructions. It was within the

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knowledge of all parties when the policy was under-written that the coast of Portugal was much infested with privateers. The counsel for the defendant contended that the *Ceres* never left the coast of Portugal with convoy. The LORD CHIEF JUSTICE directed the jury, that as the Oporto trade had put themselves under the convoy of the *Speedy* cutter and *King's-fisher* which formed one part of the aggregate convoy for England, they had thereby deprived themselves of all power of acting for themselves, and had therefore taken their departure from the coast of Portugal with convoy. He observed that the liberty given to the *Ceres* by the policy to touch at other ports on the coast of Portugal, did not vary the inference with respect to her being under convoy for England from the moment that she received sailing instructions. A verdict was found for the plaintiff, with liberty to the defendant to move for a nonsuit.

Accordingly a rule *nisi* having been obtained for that purpose on a former day ;

Shepherd and *Bayley*, Serjts. now shewed cause :

It appears from the cases that a ship is held to have sailed on her voyage when she has quitted her port of loading. *Bond v. Nutt*, Cowp. 601 ; and *Thellusson v. Fergusson*, Doug. 361. And if she sail with a convoy appointed by Government, however that convoy be constituted, it is a fulfilment of a warranty to sail with convoy. *Smith v. Redshaw*, Park, Insur. 349 ; and *De Garay v. Claggett*, *ibid.*† These authorities shew that the *Ceres* did depart from Oporto with convoy for England. All connection with the coast of Portugal was at an end as soon as she had taken her departure from Oporto ; and though she was proceeding to the Bay Doyras in pursuance of her sailing orders at the time when the fleet was dispersed, she was *not the less upon her voyage to England. Had she been ordered by her convoy to pursue any other course, she must have obeyed, and though the course prescribed might have been very much out of her way, yet she would not have been guilty of a deviation. The clause for return of premium on which this question arises must receive

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† Vid. et. *D'Eguino v. Bewiske*, 3 Insur. 349 a ; and *Hibbert v. Pigow*, B. R. 503, 2 H. Bl. 551. Park, *ib.* 339.

one of three constructions; 1st, if the ship sail with convoy from that port on the coast of Portugal from which the Oporto convoy shall sail; 2ndly, if she sail with convoy from any port on the coast of Portugal; and 3rdly, if she sail with convoy from the last port on the coast of Portugal, at which the convoy shall touch. If either of the two former constructions be correct, the plaintiffs are entitled to recover; and it is hardly to be supposed that the underwriters when the policy was effected contemplated the third, since it was well known to them that the coast of Portugal was infested with privateers, and it was not therefore their interest to allow the *Ceres* to go from Oporto to Lisbon without convoy, in order to gain the return of premium by departing from thence with convoy.

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Vaughan and Lens, Serjts. in support of the rule :

It may be admitted that when the *Ceres* sailed from Oporto with the *Speedy* cutter and *King's-fisher*, she sailed with convoy on the voyage insured. The question is, whether the sailing from Oporto was a sailing from the coast of Portugal? That was a condition precedent, and unless strictly complied with the plaintiff cannot recover. The underwriters appear to have had two risks in contemplation; 1st, while the ship was on the coast of Portugal, touching and staying at the ports there, until she had taken her final departure from thence; 2ndly, from such final departure till her arrival in England: and it was in consideration of being relieved from a part of the latter risk that the premium was to be returned. Now though it may be allowed that in a general sense the convoy from Oporto was a convoy for England, yet it may be also considered in a more limited sense, as a convoy along the coast of Portugal: and it is very clear that the underwriters did not mean the proviso for a return of premium to attach until the *Ceres* had taken her departure from the coast with convoy across the Atlantic. A policy of insurance is an instrument in which matters are expressed with peculiar conciseness. The Court therefore will be inclined to give effect to every word employed: but in this case the words "from the coast of Portugal" must be struck out unless they be construed to mean "from the district of Portugal."

AUDLEY LORD ELDON, Ch. J. :

r.
DUFF.

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After all the consideration which I have been able to bestow upon this subject, I remain of the same opinion which I entertained at the trial, and therefore think that the case was properly decided by the jury. The case is neither more nor less than this. From the disposition of the enemy's force it happened that we had many merchant ships collected in the various ports of Portugal. Lord St. Vincent as commander upon that station, was to provide a convoy for them in such a manner as he should think best. With respect to many of those ships, it could hardly be ascertained, at the time when the policies were underwritten, in what ports they were; though indeed it was understood that the *Ceres* was at Oporto. The uncertainty therefore under which the parties laboured, respecting the manner in which the convoy would be formed, and the place from which it would depart, created the necessity of employing the expressions which have been introduced into this policy. The assured agreed that on the ship being insured from the port in which she then was to Lynn, the underwriter should have 12 guineas per cent.; but that in case the voyage was undertaken with convoy, there should be a return of 6l. per cent. It being unknown from what port on the coast of Portugal the convoy would sail, the clause for the return of premium was to be adapted to the circumstances of the case. The departure with convoy might be from Oporto, or it might be from some other place; it became necessary therefore to introduce some expression which extended to something more than a mere departure from Oporto. Had the insurance been from Portugal, the introduction of the words, "from the coast of Portugal," might have furnished an argument in the plaintiff's favour. But the insurance being from Oporto which is a port on the coast of Portugal, it may be inferred that the assured intended to claim a return of premium, not only if the ship departed from Oporto with convoy, but if she departed with convoy from any port on the coast of Portugal, not excluding Oporto. With respect to the liberty given by the policy to touch and stay at any ports on the coast of Portugal, I think it quite clear that when the ship departed from Oporto with convoy, that liberty was at an end. It must be understood that such liberty was

given to the *Ceres* when not under convoy; for then only would she be in a situation to exercise it. Having in this case departed from Oporto with convoy, the policy must be considered as if the above mentioned liberty had never been conceded. The only fair interpretation of the agreement is, that the *assured should have the benefit of the policy, though she sailed from Oporto without convoy, but that if the *Ceres* sailed from Oporto, which is on the coast of Portugal, with convoy, then there should be a return of premium.

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HEATH, J. :

This question is new in specie because it has arisen on a transaction which never happened before. It had been usual for ships to go from Oporto to Lisbon to meet with convoy. But in the present instance it was thought proper, on account of the number of privateers, to send the *Speedy* cutter and *King's-fisher* to collect the trade. There are however established principles on which this case must be decided. It has always been understood that provisions for a departure with convoy have relation to the custom of trade and the orders of Government, and ought therefore to receive a liberal construction. There are many instances in Park's Insurance where ships having been warranted to depart with convoy from the port of London, but the convoy having been appointed to sail from the Downs, or from Spithead, reference has been had to the orders of Government, and the warranties have been held to be fulfilled by joining convoy at those places.† It was contended that we should in effect strike out some of the words of the policy if we decided in favour of the plaintiff: but that argument, if just, would apply to those cases to which I have alluded where ships have been warranted to depart with convoy from the port of London. The question is, what was to be the *terminus a quo*? as to which I think the cases cited are directly in point. I am clearly of opinion that the event has happened on which the contract for a return of premium was to attach, and if any doubt could be entertained upon the words, they must be construed

† Vid. *Lethulier's case*, 2 Salk. 443; and *Gordon v. Morley*, 2 Str. 1265; and *Park, Insur.* 344.

AUDLEY v. DUFF. most favourably for the assured. The underwriters engaged to return the premium, and *verba fortius accipiuntur contra proferentem*.

ROOKE, J. :

[*116] Since this rule was first moved for I have entertained some doubts upon the subject, but am now satisfied that the verdict is right. The premium was given on a war risk: the *Ceres* therefore was at liberty either to touch and stay at any of the ports of Portugal, with a view to obtain convoy, or to sail direct for England without convoy; but if she obtained convoy then a part of the premium was to be returned. Now in this case there was a convoy appointed by relays to protect the trade to England; and *the Captain of the *Ceres* having sailed with that convoy with a *bonâ fide* intention to proceed for England, the proviso for a return of premium has been complied with. Had the ship been warranted to depart with convoy, she would have been under the necessity of leaving Oporto with the *Speedy* cutter and the *King's-fisher*; and her so doing would have amounted to a fulfilment of the warranty. It is true that the policy is made by the broker of the assured; but the undertaking to return the premium is the undertaking of the underwriters, and must therefore be construed most strongly against them.

Rule discharged.

1800.
Feb. 12.

W. MAINWARING, G. B. MAINWARING, AND
T. CHATTERIS v. NEWMAN.

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(2 Bos. & P. 120—125.)

A. makes a promissory note in favour of A., B., and C. The note is indorsed by them to C., E., and F., who, as holders, bring an action upon the note against B. as an indorser. The action will not lie; nor can it be made good by any amendment in respect of parties.†

THE declaration in this case stated “that one James Brander, on &c. at &c. made his certain note in writing commonly called a promissory note, his own proper handwriting being thereunto subscribed bearing date the same day and year afore-

† See Bills of Exchange Act, 1882, s. 61.

said and then and there delivered the said note so subscribed to the said William Newman and one James Brander and one Thomas Chatteris carrying on trade together in partnership under the name style and firm of Newman Brander & Chatteris by which said note the said James Brander two months after date promised to pay to the order of the said William Newman James Brander and Thomas Chatteris by the names and description of Messrs. Newman Brander & Chatteris 2,800*l.* value in account. And the said William Newman James Brander and Thomas Chatteris to whose order the payment of the said sum of money in the said note contained was *thereby appointed to be made afterwards and before the payment of the said sum of money in the said note contained or any part thereof and before the time thereby appointed for such payment to wit on &c. at &c. indorsed the said note, the hand-writing of one of them on their joint and partnership account and in their joint and partnership name style and firm of Newman Brander & Chatteris, being thereunto subscribed and by that indorsement appointed the contents of the said note to be paid to the said William Mainwaring George Boulton Mainwaring and Thomas Chatteris, and then and there delivered the said note so indorsed to the said William Mainwaring George Boulton Mainwaring and Thomas Chatteris of which said indorsement so made upon the said note as aforesaid the said James Brander afterwards to wit on &c. at &c. had notice. And the said William Mainwaring George Boulton Mainwaring and Thomas Chatteris aver that afterwards and when the said note became due and payable (to wit) on &c. at &c. they the said William Mainwaring George Boulton Mainwaring and Thomas Chatteris shewed and presented the said note so indorsed as aforesaid to the said James Brander for his payment of the said sum of money therein contained and then and there required him to pay the same. But the said James Brander did not then or at any time whatsoever pay the said sum of money in the said note mentioned or any part thereof but then and there wholly refused so to do of all which premises the said William Newman James Brander and Thomas Chatteris afterwards to wit on &c. at &c. had notice. By reason of all which premises and by force of the statute in that case

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made and provided the said William Newman became liable to pay the said William Mainwaring George Boulton Mainwaring and Thomas Chatteris the said sum of money in the said note mentioned and being so liable the said William Newman in consideration thereof afterwards to wit on &c. at &c. undertook and to the said William Mainwaring George Boulton Mainwaring and Thomas Chatteris then and there faithfully promised to pay to them the said sum of money in the said note mentioned when he the said William Newman should be thereunto afterwards requested." There were also counts in *indebitatus assumpsit* for money had and received, money paid, and money lent, and on an account stated, in each of which William Newman was stated to be indebted to William Mainwaring, George Boulton Mainwaring, and Thomas Chatteris, and in consideration thereof, to have promised to pay to them 7,000*l*. These counts

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were followed by the common *breach that William Newman had not paid to the said William Mainwaring, George Boulton Mainwaring, and Thomas Chatteris, or either of them, &c.

Pleas. 1st, *Non assumpsit*. 2dly, "That the said Thomas Chatteris, one of the said payees and indorsers of the said promissory note in the first count of the said declaration mentioned, is one and the same person with the said Thomas Chatteris one of the said plaintiffs, and not other or different, and that the said several promises and undertakings in the said declaration mentioned were, and each of them was, made by the said William Newman together with the said Thomas Chatteris, jointly, and not by him the said William Newman separately from and without the said Thomas Chatteris, to wit, &c. And this, &c. Wherefore," &c.

To this second plea there was a special demurrer assigning for causes "that the said William Newman hath not in or by that plea traversed or denied the making by him the said William Newman of the said promises or undertakings in the said declaration mentioned, nor hath he thereby confessed and sufficiently avoided the same. And also for that the said William Newman hath thereby attempted to plead in bar of the actions of the said William Mainwaring, George Boulton Mainwaring, and Thomas Chatteris, matters which ought to have been pleaded, if

at all, in abatement of the original writ of the said William Mainwaring, George Boulton Mainwaring, and Thomas Chatteris, and not in bar of the said action. And also for that the same plea doth not mention but wholly omits the said James Brander the other payee and indorser in the first count of the said declaration mentioned of the said promissory note therein mentioned. And also for that the matters contained in the same plea are wholly immaterial and contain no answers to the said declaration of the said William Mainwaring, George Boulton Mainwaring, and Thomas Chatteris, and that the same is in other respects evasive, argumentative, and informal."

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[The case was argued by *Lens*, Serjt. in support of the demurrer, and by *Heywood*, Serjt. *contrá*.

LORD ELDON, Ch. J. on a subsequent day said :

The present opinion of the Court is, that the defendant must have judgment. Indeed it appears to me that the subject of the present plea could not have been pleaded in abatement; because a plea in abatement ought to give a better writ, not to shew that the plaintiff can have no action at all. Certainly the case is of great importance, and it has not been without some hesitation that I have been able to come to a decision upon it. The facts of the case are these; a man of the name of Brander makes a promissory note to three persons, namely to Newman, to himself Brander, and to Thomas Chatteris. This note is indorsed to William Mainwaring, George Boulton Mainwaring, and Thomas Chatteris, who are clearly the persons appearing on this record as plaintiffs. The effect of a judgment for the defendant will be, that if a man make a note to himself and others carrying on business under a particular firm, and that partnership be dissolved, the promissory note can neither be put in suit as such, nor enforced as an equitable agreement, because on a promissory note stamp. Considering therefore the quantity of circulating paper in this country standing under the same circumstances with the note in question, the consequences of such a decision may be highly injurious. However the case of *Moffatt v. Van Millingen*† cited by my brother *Heywood* is unanswerable.

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† E. 27 G. III. B. R.

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The case stood over till this day, when the Court observed that if any inconvenience should result from a judgment in favour of the defendant it was for the Legislature to interfere, but that the defendant was entitled to judgment.

Judgment for the defendant.

C. P. EASTER TERM.

1800.
May 8.

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SHIRLEY v. SANKEY AND OTHERS, EXECUTORS OF COLLINGWOOD.

(2 Bos. & P. 130—131.)

An action will not lie on a promissory note given in payment of a wager on the amount of the hop duties.†

THIS was an action on a promissory note for 167*l.* 10*s.* dated the 12th July, 1793.

The cause was tried before Hotham, B., at the last Spring assizes for Kent, when it was proved that in August, 1792, the plaintiff and the defendants' testator laid a wager on the amount of the hop duties for that year; that the event proving favourable to the plaintiff, the defendants' testator gave him the promissory note in question for the amount of the wager.

At the trial it was objected, that since it was established by the case of *Atherfold v. Beard*, 2 Term Rep. 610,‡ that wagers on the amount of the hop-duties, or of any other branch of the public revenue, were illegal, and no action could be maintained upon them, therefore the present plaintiff could not maintain an action on this note, the consideration of which was a wager upon the amount of the hop-duties.

The learned Judge, being of that opinion, nonsuited the plaintiff.

Bayley, Serj. on a former day moved to set aside that nonsuit, and contended that this case was distinguishable from

† See now the Gaming Act, 1892 (55 Vict. c. 9.)

‡ 1 R. R. 556.

Atherfold v. Beard ; first because the note was not given until the growth of the hops was complete, consequently it was not possible for either party to affect the amount of the duties with a view to his own interest ; secondly, that as the question respecting *the amount of the duties was admitted by the note to be in favour of the plaintiff, no discussion of that question need now take place, and therefore no inconvenience could arise to the public. He urged that this note stood on a different footing from notes given on smuggling or other illegal transactions of that kind, since the wager which was the consideration of it, was neither illegal or immoral in itself, though the Court had refused to enforce it on account of public inconvenience.

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The COURT said, they would look into the case of *Atherfold v. Beard* before they granted a rule *nisi*, and on this day,

LORD ELDON, Ch. J., said :

We can discover no difference between this case and that of *Atherfold v. Beard*. There also the discussion respecting the amount of the hop-duties was shut out ; for the plaintiff gave in evidence the admission of the defendant that he had lost his wager, and upon that evidence obtained a verdict. What difference then is there between the two cases ?

Bayley, Serjt. took nothing by his motion.

PRICE *v.* MESSENGER AND ANOTHER.

(2 Bos. & P. 158—163.)

1800.
May 24.

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If an officer seize goods in obedience to the warrant of a magistrate, whether that warrant be legal or not, he cannot be sued without a previous demand of a copy and perusal of the warrant according to 24 Geo. II. c. 44. If the warrant be to seize "stolen goods," and the officer seize goods which turn out not to have been stolen, he is still within the protection of 24 Geo. II. c. 44.†

TRESPASS for seizing and taking a quantity of moist sugar and a quantity of tea and nails of the plaintiff, and for assaulting

† The question arises on s. 6 of the statute which, so far as relates to actions against the officers acting in obedience to the warrant, is still in force.—R. C.

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and imprisoning his person, and for carrying the plaintiff, together with the above goods, before a justice of the peace, under colour and pretext that part of the said goods, to wit, the sugar had been before then feloniously stolen from some ship in the Thames, and had been found concealed in certain premises of the plaintiff in which he carried on his trade and business of a grocer. There was a second count for assaulting and imprisoning the plaintiff generally, and a third for seizing and taking away his goods.

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The defendants pleaded not guilty as to all but taking away the tea and nails, as to which they suffered judgment by default.

This cause came on before Lord Eldon, Ch. J. as well to try the issue joined, as to assess damages upon the judgment by default at the Westminster sittings after last Hilary Term. The evidence was in substance as follows: The plaintiff was a grocer living on the Surrey side of Westminster bridge, and the defendants two constables of one of the police offices in Westminster. On the 2nd of April, 1799, an information was exhibited against the plaintiff at the police-office, upon which the following warrant was granted. "Surrey and Middlesex to wit. To all constables and other His Majesty's officers of the peace whom these may concern. Whereas complaint upon oath hath been this day made unto me one of His Majesty's justices of the peace for the said counties by Henry Nash that there was lately stolen from some ship or vessel lying in the river Thames a quantity of sugar and that there is just cause to suspect that the said stolen goods are knowingly concealed or deposited in the shop warehouses out-houses yard or premises belonging to and occupied by Price & Co. situate the second house in Coad's Row on the Surrey side of Westminster bridge nearly opposite to Astley's theatre, these are therefore to require you forthwith to make diligent search in the day time in the said premises for the said stolen goods and if you find the same or any part thereof that then you secure the said goods, and bring the person or persons in whose custody you find the same before me or some other of His Majesty's justices of the peace to be examined and dealt with according to law. Given under my hand and seal the 2nd day of April, 1799, P. Colquhoun." On the same day on

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which the warrant issued the defendants went to the plaintiff's house, and finding some sugar of a particular quality selling under prime cost, and a bag of nails and two parcels of tea of which no satisfactory account was given, sent to the office requesting instructions for their conduct respecting the tea and nails which were not mentioned in the warrant; upon which they were ordered by the magistrate to bring the sugar, tea, and nails to the office. This they accordingly did, and at the same time carried the plaintiff before the magistrate, who discharged him for that day, but desired him to attend the next morning. The plaintiff having attended the next morning, and no sufficient evidence having been produced against him, he was discharged altogether, and his property was afterwards restored. It was proved that the defendants had conducted themselves with great civility towards the plaintiff. Lord ELDON directed the jury that the warrant *was no justification as to any thing but the assault, imprisonment, and taking the sugar, and that the verbal orders of the magistrate under which the defendants seized the tea and nails would not avail them. For the plaintiff, however, it was insisted that even the assault, imprisonment, and taking the sugar under the circumstances of the case, were not justified by the warrant: on the other hand, it was contended that they were justified by the warrant which was granted by virtue of the Bum-boat Act; † and that at all events a copy of the warrant should have been demanded, pursuant to 24 Geo. II. c. 44. His Lordship having desired the jury to distinguish the damages incurred by the seizure of the tea and nails, from those incurred by the assault,

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† 2 Geo. III. c. 28, s. 7, which enacts, that it shall be lawful for any justice of the peace, upon information on oath, that there is cause to suspect that any merchandizes, &c. (suspected to have been stolen or unlawfully come by, or taken from some ship or vessel in the river Thames) are concealed in any dwelling-house, warehouse, &c. by warrant under his hand and seal, to cause every such dwelling-house, &c.

to be searched in the day time; and if any such merchandizes, &c. shall be found therein, to cause the same to be deposited in some place of safety, and also to cause the person in whose house, &c. the same shall be found, to be brought before him; and if such person shall not give a satisfactory account how he came by the same, he shall be adjudged guilty of a misdemeanor.

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imprisonment and seizure of the sugar, a verdict was found of 30*l.* for the former, and 70*l.* for the latter.

A rule having been moved for, calling on the plaintiff to shew cause why this verdict should not be set aside, it was granted as to the 70*l.* the Court intimating an opinion that as to the 30*l.* the verdict could not be disturbed.

Shepherd and Best, Serjts. now shewed cause :

The main objection to the plaintiff's recovery is, that no demand was made of a copy of the warrant under which the defendants acted, pursuant to 24 G. II. c. 44. But no officer can avail himself of that objection, unless he shew that he has acted in obedience to the warrant of a magistrate, per Lord MANSFIELD, *Dawson or Lawson v. Clarke*, cited 3 Bur. 1767; whereas in this case the defendants exceeded the authority delegated to them by the magistrate. Where the warrant itself authorises others to act in a matter not within the jurisdiction of the magistrate, he is personally responsible; but where an officer exceeds his authority, the magistrate who gave that authority is not liable for such excess. Here the warrant was to seize stolen sugar, and the officers were bound at their peril to seize stolen sugar or none at all. In the case of *Boote v. Cooper*, cited 1 T. R. 535,† where the warrant was to enter and search for concealed goods, it was rightly held that the officer was justified in entering and searching, though no concealed

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*goods were found, that being no excess of authority; but in *Entick v. Carrington*, 2 Wils. 286, DE GREY, Ch. J. seems to have considered that an officer who, under a warrant to search for stolen goods, should seize the goods of the owner of the house, would not be within the protection of the 24 Geo. II. c. 44. Supposing the warrant itself to be legal, still the defendants have not executed it according to its true spirit; for they were not to decide wantonly that any sugar found in the plaintiff's house was stolen sugar, but to exercise a sound discretion. Now the sugar seized by the defendants appears to have been exposed in a situation in which no man would place goods subject to seizure. Though the warrant speaks of

† Reported 3 Esp. Cas. 135, by the name of *Cooper v. Booth*, in error in K.B.

sugar deposited or concealed, yet the word "deposited," when applied to stolen goods, must mean deposited for the purpose of concealment; especially as it is connected with the word "concealed."

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Cockell, and Bayley, Serjts. contrd :

If the officers acted in obedience to the warrant, it is altogether immaterial whether the warrant were legal or illegal; for if legal the officers and the magistrate are both justified; if illegal the magistrate alone is responsible. It would be highly dangerous to allow the officer to exercise his judgment whether the warrant directed to him by the magistrate were good or not; it is his duty to obey. The warrant in this case only asserted that there was stolen sugar in the plaintiff's house, and ordered the officers to seize it; now it was impossible for them to ascertain whether the sugar they found was stolen or not, or how much of it was in that predicament.

LORD ELDON, Ch. J. :

The ground upon which I have formed my opinion in this case may be stated in a very few words. The public interest requires that officers who really act in obedience to the warrant of a magistrate should be protected. In such cases, therefore, the law has provided that the remedy of the party grieved shall be confined to the magistrate, as well where he has granted a warrant without having jurisdiction, as where the warrant which he has granted is improper. The statute provides that no action shall be brought against an officer for any thing done in obedience to any warrant of any justice of the peace, unless a demand hath been made of a copy and perusal of the warrant; and in that case, after compliance with such demand, any action shall be brought against such officer for any such cause as aforesaid, without making the justice a defendant, a verdict shall be given for the defendant, "notwithstanding any defect of jurisdiction in such justice;" and if such action be brought jointly against such justice, and *also against such officer, on proof of such warrant, the jury shall find for the officer "notwithstanding any such defect of jurisdiction as aforesaid." The Act therefore

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takes it for granted, that an officer may be said to act in obedience to the warrant of a justice of the peace, though such justice had no jurisdiction, and though the warrant be an absolute nullity. For it is as much a defect of jurisdiction, if the justice grant an improper warrant in a case over which he has jurisdiction, as if he had no jurisdiction over the case at all. The only question therefore is, Whether the act of the officer were done in obedience to any warrant of any justice of the peace? And considering the nature of the protection intended to be given to officers by this act, I think it reasonable to say that the defendants in this case acted in obedience to the warrant within the meaning of the Legislature. If this be so, it is sufficient for the defendant to say that no demand of a perusal and copy of the warrant was made, whether that warrant on production would have afforded a defence or not. It was not agreed by the plaintiff's counsel whether the warrant itself were legal or illegal. Now suppose it to have been legal: the officer acted with as much precision in the execution of the warrant as the justice in granting it. If the information given to the latter was insufficient to enable him to describe the goods with certainty, the former was unable to ascertain with certainty what goods he was directed to seize. Then suppose the warrant to have been illegal, it was not competent to the defendant to judge of its legality. If he executed it in the only way in which it was capable of being executed, namely, by making it attach on all goods which fell within the description contained in it, he acted in obedience to it, and having done so, he is entitled to avail himself of the protection of the Act. Whether the warrant would have afforded a defence to the justice or not I shall give no opinion.

HEATH, J. :

The only question is, whether the constable acted in obedience to the warrant? Whether the warrant were legal or not, we are not called upon to decide. When this defendant seized the teas he was not acting in obedience to the warrant; but when he seized the sugars he was. The warrant, after stating that certain sugars had been stolen, and that there was reason to suspect that the same were concealed or deposited in the

plaintiff's house, directs the defendant to seize them. Under these circumstances, he could not act otherwise than he has done. PRICE
"."
MESSENGER.

ROOKE, J. :

The defendant appears to me to have acted in obedience to his warrant, and therefore to come within the protection *of the statute. If the warrant were illegal the plaintiff might have proceeded against the justice: but as he has chosen to abandon that remedy and to proceed against the constable, he is only entitled to a verdict for such damages as arose from that seizure which was not made in obedience to the warrant. [*163]

Verdict to be entered for the plaintiff for 30l. only.

ANDERSON v. PITCHER & Ux.

(2 Bos. & P. 164—172.)

1800.
May 26.

A warranty to depart with convoy is not complied with, unless sailing instructions be obtained before the ship leaves the place of rendezvous, if by due diligence of the master they can be then obtained. [164]

THIS was an action for money had and received to the use of the plaintiff by the defendant's wife, before her intermarriage with the defendant.

This cause was tried before Lord Eldon, Ch. J. and a special jury at the Guildhall sittings after Hilary Term, when the following case appeared in evidence:—On the 31st of October, 1795, the plaintiff underwrote a policy of insurance on the *Golden Grove*, at five guineas per cent., "at and from London to all or any of the West India islands, Jamaica and St. Domingo excepted, with leave to go to the place of rendezvous to join convoy, and warranted to sail from thence with convoy for the voyage." The ship having been lost soon after she sailed from Portsmouth, the plaintiff paid 284l. 5s. under the policy. To recover back that sum the present action was brought, the plaintiff being of opinion that the *Golden Grove* never received her sailing instructions, and therefore had not fulfilled the warranty to depart with convoy. It now appeared that the *Golden Grove* arrived at Spithead about nine o'clock in the morning of the 15th November, 1795; that she came round

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under the care of the first mate, the captain himself being on shore at Portsmouth; that on the day preceding (the 14th) sailing instructions were delivered at Portsmouth to all such ships as applied regularly for them, and that the captain of the *Golden Grove* previous to her arrival made enquiry concerning sailing instructions, but found that they could not be obtained until the ship was actually in sight; that on the 15th of November, by day-light, Admiral Sir H. C. Christian, the commander of the convoy got under weigh, but had not entirely quitted the roadstead until about four o'clock in the evening; that when he got under sail he left the *Trident* frigate to bring up such vessels as did not weigh anchor with him, that about one o'clock the same day the captain of the *Golden Grove* repaired on board, and got under weigh, at which time the *Trident* had also got under weigh, and both the admiral's ship and the *Trident* had then proceeded so far, that it was clear the *Golden Grove* could not overtake the former soon enough for the captain to go on board that night, and it was even doubtful whether he could overtake the latter; that on the next day, between 10 and 12 o'clock in the forenoon, the captain *of the *Golden Grove*, being then only a quarter of a mile from the admiral's ship, went on board her, and obtained sailing instructions; that soon afterwards the *Golden Grove* was lost, having been, from the time of her departure to that of the loss, under the protection of the convoy. Lord ELDON directed the jury, that although under some circumstances sailing instructions might be dispensed with, yet that this did not appear to be a case of that kind; that the *Golden Grove* did not appear to him to have departed from the place of rendezvous with convoy, since she had either not arrived time enough to obtain sailing instructions, or if she had arrived time enough, her captain had not used the necessary endeavours to obtain them before he sailed. The jury found a verdict for the plaintiff.

Early in this Term a rule *nisi* for a new trial was obtained, in support of which, affidavits of the defendant's attorney, and of several naval men, to the following effect, were filed:—That the point upon which the verdict had proceeded was a matter of surprise upon the defendant, it having been understood that the

cause would be tried on the single question, Whether sailing instructions had ever been obtained? that it is the constant practice for commanders of convoys to give sailing instructions to vessels which sail under their protection, after leaving the place of rendezvous, and that such vessels are always understood to depart with convoy; that sailing instructions are never given to the captain of any vessel until the vessel is in sight; that when the Admiralty directs the commander of a ship of war at Spithead to take under convoy a fleet bound to the westward, he is generally instructed to put to sea thirty hours after the wind has been fair, with a view to give time to the ships in the Downs to come round to Spithead; and, that as such ships frequently do not arrive until the convoy is under weigh, and are often prevented, by blowing weather, from getting their sailing instructions at the place of rendezvous, it is usual for their captains to obtain them the first time the convoy is brought to at sea.

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Shepherd, Serjt., in the course of the Term shewed cause; and after observing, that as the facts of this case had been before the Court upon a former occasion in *Webb v. Thompson*,† they would not interfere, unless they entertained very great doubts upon the question; contended, that the *Golden Grove* was not within any of the exceptions to the general rule, which *required sailing instructions in order to the fulfilment of a warranty to depart with convoy; and that consequently, as she had not obtained them before her departure from the place of rendezvous, she had not fulfilled the warranty in this policy; that in this case the commander of the convoy was ready to have given sailing instructions, had they been applied for; and that, if such a latitude as was contended for was to be allowed, it must hereafter be deemed sufficient if ships obtain their sailing instructions the day before their arrival at the port of discharge.

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Best, Serjt. in support of the rule:

Although the *Golden Grove* had not obtained sailing instructions on the 15th, when she departed from Spithead, yet she received them early enough on the next morning to constitute a

† 4 R. R. 757; 1 Bos. & P. 5.

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departure with convoy within the spirit of the warranty. The words of the warranty do not require that sailing instructions should be obtained, and therefore a greater latitude may be allowed than in a construction of the very letter of the warranty. Usage of trade has been constantly admitted in the construction of warranties to depart with convoy; thus, if a ship depart from the port of London and join convoy at Portsmouth or the Downs, it is a sufficient compliance with the warranty to depart with convoy.† Usage therefore may be admitted in the present case, to shew that sailing instructions are not necessary till the ship has actually put to sea. No case has been cited to shew that they are necessary at the time of breaking ground; if they be obtained as soon as they become necessary for the protection of the ship, it is sufficient; and, as the commander of the convoy in this case gave sailing instructions to other ships at the same time that he gave them to the *Golden Grove*, it appears that he considered it sufficient for their protection to deliver them at that time. It may be contended that the case of *Victoria v. Cleeve*, 2 Str. 1250, Park's Insur. 348, is distinguishable from this; for there it was impossible to get sailing instructions. But *Veedon v. Wilmot*, Park's Insur. 341, note *a*, is in point, for their sailing instructions were not applied for till after the convoy was under sail. No neglect is imputable to the captain in this case; he applied for his sailing instructions before the *Golden Grove* arrived, but was refused them; she actually did arrive on the morning of the 15th, before the convoy had left the place of rendezvous; but, as the convoy was then under sail, it may have been dangerous for him to put out a boat. * On the morning of the 16th the sailing instructions were obtained without any inconvenience having arisen from the want of them, the ship having remained the whole time under the protection of the guns of the convoy.

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Cur. adr. vult.

The opinion of the Court was now delivered by

LORD ELDON, Ch. J. :

This action is brought to recover back 284*l.* 5*s.*, paid by the

† P. 553, *ante*; 2 Bos. & P. 115.

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plaintiff as underwriter of a policy on the ship *Golden Grove*, to the defendant, the assured in that policy, under the supposition that the loss which happened was within the terms of his undertaking. He now says, that on a better examination of all the circumstances attending that loss, he finds he was not liable, as he had erroneously supposed, and therefore, that the money which he paid to the defendant under a mistake may be recovered back by him. This is a case in which the convoy appointed by Government was ready to give sailing instructions at the place of rendezvous, to all such vessels as were ready to receive them. And it appears to me, that if the captain of the *Golden Grove* had been on board his ship at nine o'clock in the morning, when she arrived, he might have obtained sailing instructions from the frigate before he left the place of rendezvous. In point of fact, however, the admiral was under weigh before the *Golden Grove* arrived, and the frigate was under weigh before the captain was on board. It is clear also, that the captain of the *Golden Grove* could not have gone on board the admiral that night, and it was very doubtful whether he could have gone on board the frigate. The question for the Court to decide is, Whether a new trial should be granted, the jury having determined that, under all the circumstances of the case, the warranty was not complied with? Considering that the case came to trial chiefly on the question, Whether or not any sailing instructions were ever obtained by the *Golden Grove*? and that the defendant was somewhat surprised by the point raised at the trial, respecting the time at which the sailing instructions were obtained, I should wish a new trial to be granted, if I could see any proposition of law to be stated to a jury in the defendant's favour. But it seems to me, as well from the affidavits as the evidence, that the defendant would not be entitled to retain a verdict if he should obtain one. The policy contained this warranty: That the ship should be at liberty to go to the place of rendezvous to join convoy, and that she should sail *from thence with convoy for the voyage. It is now too late to say that this warranty is not to be expounded with due regard to the usage of trade. Perhaps it is to be lamented, that in policies of insurance, parties should not be left to express their own meaning by the terms of

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the instrument. This seems to have been the opinion of that great judge Lord HOLT.† It is true, indeed, that Lord MANSFIELD, who may be considered the establisher, if not the author, of a great part of this law, expressed himself thus: "Wherever you render additional words necessary, and multiply them, you also multiply doubts and criticisms."‡ Whether, however, it be not true, that as much subtlety is raised by the application of usage to the construction of a contract, as by the introduction of additional words, might, if the matter were *res integra*, be reasonably questioned. If, therefore, the question before us be still undetermined, the inclination of my mind will be to adhere to the letter of the contract: and I feel the more disposed to do so, since it appears most clearly, from the affidavits which have been produced, that no man of the highest experience in the navy can ascertain, by any reference to usage, what other interpretation ought to be adopted. The first question is, What is the meaning of the words, "departing with convoy?" Do they mean departing with sailing instructions in all cases? or, Do they mean departing with sailing instructions in a case circumstanced like this? It is clear that sailing instructions are not necessary in all cases: but the decisions authorize me in saying, that in general cases they are required; and if that be so, I do not find any thing in the circumstances of this case which can bring it within any of the exceptions to the general rule. In *Hibbert v. Pigon*,§ Lord MANSFIELD laid it down generally, that sailing instructions are essential to convoy. Mr. Justice WILLES, indeed, entertained doubts upon the subject; and Mr. Justice BULLER declined giving any opinion upon that point. In that case, however, it was not necessary to decide whether sailing instructions were essential or not; for though captain Mann had neglected no means of obtaining sailing instructions from the *Glorieux*, yet it did not appear, upon the first trial, that the *Glorieux* was a convoy appointed by Government, and therefore the Court was obliged to hold that the warranty was not fulfilled. It is true that it was determined in **Victoria v. Cleeve*,|| where the convoy was appointed by Government, that sailing instructions may be dispensed with where no

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† *Lethalier's case*, 2 Salk. 443.

‡ In *Lilly v. Ewer*, Dougl. 74.

§ *Park's Insur.* 339.

|| 2 Str. 1250; *Park's Insur.* 348.

default appears on the part of the master. It being once decided that a convoy within the terms of the policy means a convoy appointed by Government, it seems to follow of necessity that the ship must depart with sailing instructions, if by the due diligence of the master they can be obtained. The value of a convoy appointed by Government in a great measure arises from its taking the ships under control as well as under protection. But that control does not commence until sailing instructions have been obtained; nor can it be enforced otherwise than by their means. Indeed, the reason of that rule which requires that the convoy should be appointed by Government, shews the necessity of having sailing instructions; since without them the ship does not stand in that relation or under those circumstances in which she can take the full benefit of the Government convoy. If the fleet be dispersed by a storm, how is she to learn the place of rendezvous? If it be attacked by the enemy, how is she to obey signals? In short, what communication can the protected have with the protecting force. It has been contended, that if she be under the protection of the guns it is sufficient. But will it be contended that, provided she be under the protection of the guns at her departure, though sailing instructions be never obtained during the voyage, or not till the last day of the voyage, the warranty is complied with? Either sailing instructions are not necessary, or, if they be necessary, they must be so at some given period, and can only be dispensed with in some particular cases. Then can any other period be assigned but the beginning of the voyage? Some of these affidavits say, that if the ship has obtained her sailing instructions at any time before she is lost, it is sufficient; but that she must obtain them before she is lost. Are we then to depart from the terms of the contract between the underwriter and the assured, in order to let in a construction which is at variance with the reason on which that contract is founded? Let us consider the exceptions to the general rule which have been admitted. Respecting *Victoria v. Cleeve* there can be no difficulty, since the very ground of the decision in that case was, that there was no default in the master, and that no activity of his could have procured sailing instructions, he having come out of the port of Fleckery in obedience to the signal of the convoy then

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off that port, and having been prevented from receiving sailing *instructions before the loss of the ship, by the roughness of the weather. In *Webb v. Thompson*,† Mr. Justice BULLER, with the assent of the Court, stated, with reference to a case arising out of the loss which happened to this very ship, that, generally speaking, unless sailing instructions were obtained, the warranty is not complied with; and the Court did not, at that time, see any circumstance by which this case could be taken out of the general rule. The late LORD CHIEF JUSTICE of this Court, in his notebook, makes this observation on the case of *Webb v. Thompson*:—"It seems to me that the single question is, whether the ship departed with convoy? In fact she sailed with the fleet. Admiral Christian distinguished accurately between ships under protection of the fleet and ships under convoy. All friends are protected while they are within reach of protection; but ships under convoy are according to him, ships under control who can be spoken to in a language which they understand. They control them—would fire at them, if they misbehave. The fact settled that it would raise the premium, would decide. It may make a difference in the premium, whether the ship be under protection without control, or under protection and control. It is necessary to inquire, therefore, whether she got sailing instructions (which is the mode of putting herself under convoy), and when? It may seem a hard case to take advantage of a slip, but the nature of the contract is an answer. It is a contract founded in the consideration of premium estimated by the risk." Taking into consideration the way in which the premium in these cases is estimated, can we say that the underwriters have had the full benefit of the undertaking of the assured to depart with convoy, when in fact it was a mere matter of chance whether the *Golden Grove* would, under the circumstances of her actual departure, ever be able to procure sailing orders or not? The present case may indeed be decided without affecting the case of any other ship which sailed with that convoy; since, if the captain of the *Golden Grove* had gone on board the frigate at nine o'clock in the morning of the 15th, he might have obtained sailing instructions, and that he did not do so was his neglect. In the case of *Veedon v. Wilmot*,‡ sailing instructions were

† 4 R. R. 757; 1 Bos. & P. 5.

‡ Park's Insur. 341, n.

not obtained; but it appears that they were applied for and refused while the convoy was in the Downs, the place of rendezvous. The ship, therefore, departed with convoy from the place of rendezvous, in the strictest sense of the word. Indeed, the Court is bound to hold, that where sailing instructions are, under such circumstances, *refused by the commander of the convoy, they are so refused for the benefit of the trade which is to be protected by the convoy. It is very usual to refuse to give them till the fleet is out at sea; and we know that La Motte who was hanged for giving intelligence to the enemy, got possession of the sailing instructions in consequence of their having been given before the departure of the fleets. It is clear, therefore, that a ship is not bound to obtain sailing instructions in the place of rendezvous at all events; but if they can be obtained by due diligence, she is bound to obtain them, because it then appears that the convoy appointed by Government decides, that under all the circumstances of the case, the place of rendezvous is the place where they ought to be obtained. The principle of law which says that a convoy means a convoy acting under the orders of Government, must operate in favour of those who, without any neglect of their own, are not able to obtain sailing instructions, because they must obey the orders of that convoy which is supposed most capable, under all the circumstances, of judging for the best. In a late case, Lord KENYON intimated a strong opinion that sailing instructions were essential where they could be had.† Having now stated the exceptions to the general rule, it does not strike me that the present case comes within any of them. (His Lordship then went through the affidavits.) It appears to me the constant usage for the commanders of convoys to give sailing instructions to all ships which depart under their protection, whenever applied for. But the question in this case is, Whether the warranty, that the *Golden Grove* shall depart with convoy from the place of rendezvous, has been fulfilled? It may be the duty of a commander to give instructions at all times; but that will not vary the contract by which the assured undertakes that the ship shall be ready to receive them at the place of rendezvous. It is stated, in one of the affidavits, to be the practice for the

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† *France v. Kirwan, Park's Insur.* 342, 346.

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Admiralty to give orders to the commanders of convoys at Spit-head, to get under weigh 30 hours after the wind has been fair, in order to give time for the ships in the Downs to come round; and that in case of blowing weather it may not be in the power of the ships which come from the Downs to obtain sailing instructions previous to the convoy having set sail. But if such a case should occur, it will remain to be considered whether it may not be said that the ship departed with convoy as far as the circumstances *of the case and due diligence on the part of the master, would admit. With respect to the case of a convoy being ordered to call off the several ports upon the coast, in order to enable such ships as may be willing to join; it is exactly the case of *Victoria v. Cleve*, where the ship being ordered by the convoy to leave the port without sailing instructions, was excused on the ground of obedience to the orders of the convoy. In this case the ship did come round time enough to have received her instructions at the place of rendezvous, had the captain used due diligence in applying for them. Not being able, therefore to represent to myself any principle of law, which could be stated to a jury as a foundation for a verdict in favour of the defendant, I think that the case must be decided on the general rule, which ought not to be infringed on account of any particular hardship which the defendant may sustain.

Per CURIAM :

Postea to the plaintiff.

C. P. TRINITY TERM.

DOE, EX DEM. BANKS, v. BOOTH.

(2 Bos. & P. 219—224.)

1800.
June 21.

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The trustees under a turnpike Act, being empowered to demise or mortgage the tolls "or any part thereof, and the turnpikes and toll-houses for collecting the same," demised to one of several mortgagees, such proportion of the tolls arising from the road and of the toll-houses and toll-gates for collecting the same as the sum advanced by him bore to the whole sum raised on the credit of the tolls. The mortgagee brought ejectment for the toll-houses and toll-gates, in order to repay himself the interest due to him. Held that he might well maintain his action, notwithstanding a clause in the Act that all the mortgagees should be creditors upon the tolls in equal degree.

EJECTMENT for three toll-houses with the toll-gates thereunto belonging. The cause was tried before Rooke, J. at the Spring assizes at York, when a verdict was found for the lessor of the plaintiff, subject to the opinion of the Court on a case which stated in substance, that the trustees under an Act of Parliament made in the 17 Geo. III. for repairing and widening the road from Halifax to Sheffield, by deed of the 5th April, 1779, in consideration of 100*l.* paid by the lessor of the plaintiff to the treasurer of the said road according to the direction of the statute, did grant, bargain, sell and demise to the lessor of the plaintiff such proportion of the tolls arising from *the road and of the turnpikes and toll-houses for collecting the same, (being the premises mentioned in the declaration), as the said sum of 100*l.* should bear to the whole sum due and owing on the credit thereof, to be holden from the 5th of April, 1779, during the continuance of the above statute, till the said sum of 100*l.* with interest at 5*l.* per cent. should be paid; that the said 100*l.* with four years' interest up to the 5th of April, 1799 is still due; that the sum of 3,600*l.* 10*s.* is the whole principal money due and owing on the credit of the said tolls and the turnpikes and toll-houses for collecting the same; that the said tolls, turnpikes, and toll-houses, on the 22nd of September, 1798, were demised to the defendant for two years from the 1st of October, 1798, at 30*s.* per

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annum, and that he is now in possession thereof and has paid all rent due ; that the costs of procuring the above Act, as also of procuring another Act of 38 Geo. III. for continuing the same for 21 years, have been paid, except the sum of 12*l.* for payment of which the treasurer has sufficient money in his hands ; that there is due to other mortgagees of the said tolls, turnpikes, and toll-houses, three years' interest on the several sums secured to them by their respective mortgages up to the 5th of October last, and to some of them four years' interest ; that one year's interest on the said sum of 100*l.* due the 5th of April, 1796, was in March, 1799, and before any interest had been paid to any other creditors or mortgagees on the tolls due in 1796 tendered to the lessor of the plaintiff, being as much as had or has been paid to any of the other mortgagees, which he then refused, insisting on the whole interest being paid ; that the interest which became due in 1797 and since, has not yet been paid to any of the creditors or mortgagees, there not being sufficient money to pay the same and what is due for the repairs of the road ; that at the time when the ejectment was served, the treasurer had in his hands 58*l.* more than sufficient to pay the costs of procuring both the above-mentioned Acts ; that the lessor of the plaintiff gave notice to the defendant, that the ejectment was brought for the purpose of recovering the possession of the toll-houses with the toll-gates thereto belonging, to the intent that the plaintiff might pay and apply the money arising from the toll-gates in discharge of the interest due upon the sum of 100*l.* by him advanced on the credit of the tolls arising from the said toll-gates, and not to recover such possession to reimburse him the said principal sum of 100*l.* so advanced as aforesaid or any part thereof.

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Williams, Serjt. was to have argued in support of the verdict, but the Court called on the other side to begin.

Clayton, Serjt. for the defendant, [cited a clause in the Act to the effect that all the mortgagees should be creditors in equal degree, and relied upon the judgment of *ASHURST, J.* in *Fair-title v. Gilbert*, 1 R. R. 456 ; 2 T. R. 171].

LORD ELDON, Ch. J. :

The case of *Fairtitle v. Gilbert* admits all that is necessary for the lessor of the plaintiff to contend. The mortgage executed in that case was a mortgage of the whole, not of any aliquot part and the toll-houses and toll-gates were also inserted in the mortgage, though the Act only authorised the trustees to mortgage the tolls. The questions made were ; 1st, Whether the trustees had any authority to mortgage the toll-houses and toll-gates? And 2ndly, if they had not, Whether they were not estopped by their own deed? The Court held that the Act gave no authority to mortgage the toll-houses and toll-gates, and that as the trustees were not acting for their own benefit, but for the benefit of the public, they were not estopped. It was there argued that the only mode of effectuating the conveyance of the tolls, was to enable the trustees to mortgage the toll-gates. But in answer to this, Mr. Justice ASHHURST observed, that “the Act expressly gives the trustees power to mortgage the tolls, but the reason why it does not give them a further power is, because no creditor *is to have a preference. Now if any creditor had a power to enter and take possession of the toll-gates, he would gain a priority which the Act has denied.” But why would he have gained a priority? Because the mortgage was a mortgage of all the tolls, not of any proportion: for I deny that in the latter case any priority would have been gained, since the lessor of the plaintiff would become the bailiff of the rest of the creditors as to all except his own proportion. It was thought that if a power had been given to mortgage the toll-gates a difficulty would have arisen, by giving a preference, which was contrary to the intention of the Act. But it does not appear to me that this difficulty would have arisen even if such a power had been given. For I should have been inclined to hold, that whatever were the form of the demise, it could only operate so as to effectuate the Act; that is, so that every other creditor should receive his due proportion, for which purpose the mortgagee must have stood in the situation of bailiff or trustee for all the other creditors. The Act in this case however seems calculated to meet the very difficulty which the Court there felt: for this Act empowers the trustees “to demise or mortgage the said tolls or any part or

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parts thereof and the turnpikes and toll-houses for collecting the same." If any one person advanced the whole sum, then the whole was to be mortgaged; if several, then the form of the mortgage inserted in the Act shews, that each creditor was to have in mortgage only such proportion of the tolls as the sum advanced by him should bear to the whole sum advanced. All the difficulty therefore suggested in the argument of the case in the King's Bench is obviated by this Act. For this Act does not contain a power to demise the toll-houses and toll-gates; and it was admitted in the King's Bench that if the Act in that case had contained such a power, the ejectment might have been maintained: at the same time this Act cures the difficulty which was thought to be the consequence of allowing an ejectment to be maintained, by requiring that a proportion of the tolls only should be mortgaged to each creditor. There is a great difference between a demise of tolls and of toll-houses. The former only gives a personal interest, in respect of which an action for money had and received may be maintained, the latter gives an interest in land which is within the statute of mortmain. The trustees in this case have executed an indenture under the Act, the effect of *which was, to transfer the title vested in them. Being authorised to grant a real interest in the toll-houses, all the consequences of law must attach upon that interest unless excluded by the Act; and it is not for this Court to say that the Legislature ought to have restrained the mortgagee from seeking his remedy by ejectment. The money advanced by the mortgagee would be very ill secured if his only remedy was either an application to the vindictive power of the Court of King's Bench, or a suit in Chancery in which all the other thirty-five mortgagees must be made parties. With respect to the action for money had and received, it would be a sufficient defence for the trustees to shew that they had distributed all the money received according to the provisions of the Act.

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Per CURIAM :

Judgment for the plaintiff.

WATSON v. CHRISTIE.

(2 Bos. & P. 224—226.)

1800.
June 21.

In trespass for assault and battery and not guilty pleaded, the jury are not at liberty to take into consideration the circumstances of the assault and battery, with a view to reduce the verdict below the amount of the damage actually sustained, if those circumstances could have been pleaded.†

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TRESPASS for assaulting and beating the plaintiff. Plea not guilty. At the trial it appeared that the defendant was the captain of a ship, and the plaintiff one of his crew; that the plaintiff while under the defendant's command had been so severely beaten by order of the defendant, that he had ever since that time been in a state of extreme ill health, and was likely to continue so during the rest of his life, which he was in some danger of ultimately losing in consequence of the assault. On the other hand, it was offered to be shewn that the beating in question was given by way of punishment for misbehaviour on board the ship, and it was insisted that the conduct of the defendant at the time of the assault being necessarily in evidence proved that misbehaviour.

Lord ELDON, Ch. J. before whom the cause was tried, directed the jury, that the only questions for their consideration were, Whether the defendant was guilty of the beating? and what damages the plaintiff had sustained in consequence of it? that although the beating in question, however severe, might possibly be justified on the ground of the necessity of maintaining discipline on board the ship, yet that such a defence could not be resorted to unless put upon the record, in the shape of a special justification; that the defendant had not said on the record that this was discipline, or justified it on any ground; that much evil *beyond the mere act of wrong had been actually suffered; which evil had been occasioned by a cause which the defendant admitted he could not justify; that in his lordship's judgment therefore the evil actually suffered in consequence of what was not justified ought to be compensated for in damages; that the

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† Followed by the Court of Exchequer in Ireland in *Pujolas v. Holland* (1841), 3 Ir. L. R. 533.—R. C.

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jury should give damages to the extent of the evil suffered, without lessening them on account of the circumstances under which it was inflicted; that if they gave damages beyond a compensation for the injury actually sustained they would give too much, but that if they gave less they would not give enough.

The jury found a verdict for 500*l.* being all the damages laid in the declaration.

Shepherd, Serjt. now moved for a rule calling on the plaintiff to shew cause why this verdict should not be set aside and a new trial be had, on the ground of the damages being excessive, and because the jury ought not to have been directed to exclude from their consideration those circumstances which tended to shew the necessity of that punishment being inflicted which was the cause of the action; for that although the plaintiff might perhaps be entitled to some damages, since the circumstances alluded to did not amount to a legal defence, yet the defendant had a right to the benefit of those circumstances by way of mitigation.

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But the Court were of opinion that his Lordship's direction was perfectly right in point of law, and that it did not appear from the report that the damages given by the jury were excessive.

Shepherd took nothing by his motion.

1800.
June 28.

SAUNDERSON v. JACKSON AND ANOTHER.

(2 Bos. & P. 238—239.)

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A bill of parcels in which the vendor's name is printed, delivered to the vendee at the time of an order given for the future delivery of goods, seems to be a sufficient memorandum of the contract within the Statute of Frauds. At all events, a subsequent letter written and signed by the vendor referring to the order, may be connected with the bill of parcels, so as to take the case out of the statute.

THIS was an action on the case against the defendants for not delivering 1,000 gallons of gin to the plaintiff within a certain

time, according to a bargain entered into between them. There was a second count for not delivering within a reasonable time.

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The cause was tried before Lord Eldon, Ch. J. at the Guildhall sittings after last Easter Term, when the contract for the delivery of the gin having been proved on the part of the plaintiff, the defendants insisted that the case was within the Statute of Frauds, inasmuch as there was no note or memorandum in writing of the bargain. The circumstances were as follow: At the time the order for the gin was given by the plaintiff to the defendants, a bill of parcels was delivered to the former, the printed part of which was, "London. Bought of Jackson and Hankin, distillers, No. 8, Oxford-street," and then followed in writing, "1,000 gallons of gin, 1 in 5. gin 7s. 350l." About a month after the above period the defendants also wrote the following letter to the plaintiff: "Sir, we wish to know what time we shall send you a part of your order, and shall be obliged for a little time in delivery of the remainder; must request you to return our pipes. We are, your humble servants, Jackson and Hankin."

On this evidence his Lordship directed the jury to find a verdict for the plaintiff, reserving the point made for the consideration of the Court.

Accordingly *Lens*, Serjt., having on a former day obtained a rule *nisi* for setting aside this verdict and entering a nonsuit, he was now called upon to begin in support of his rule. He observed that the words of the 29 Car. II. c. 3, s. 17, require that "some note or memorandum in writing of the bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorised;" and that in *Hawkins v. Holmes*, 1 P. Wms. 770, and *Stokes v. Moore*, *ib.* in the notes by Mr. Cox, the Court had held a signing by the party necessary, though the draught of the conveyance had in the former case been altered in the handwriting of the purchaser, *and in the latter, the seller had himself written instructions for the renewal of a lease. He contended, that though the printed name contained in the bill of parcels might have amounted to a signature within the meaning of the Act, if the bill of parcels had been intended to express the contract *quasi* a contract, yet

SAUNDERSON ^{v.} JACKSON. that in this case it had not been delivered to the plaintiff with that view ; that the contract itself had never been reduced to writing or ever was intended to be so ; and therefore the bill of parcels could only operate as evidence of a contract previously entered into ; and that the subsequent letter of the defendants, though signed by them, could not be treated as a note or memorandum of the contract, being accidental and only a reference to a pre-existing contract.

Shepherd, Serjt. contrà, was stopped by the Court.

LORD ELDON, Ch. J. :

This bill of parcels, though not the contract itself, may amount to a note or memorandum of the contract within the meaning of the statute. The single question therefore is, Whether if a man be in the habit of printing instead of writing his name, he may not be said to sign by his printed name as well as his written name ? At all events, connecting this bill of parcels with the subsequent letter of the defendants, I think the case is clearly taken out of the Statute of Frauds. For although it be admitted that the letter which does not state the terms of the agreement would not alone have been sufficient, yet as the jury have connected it with something which does, and the letter is signed by the defendants, there is then a written note or memorandum of the order which was originally given by the plaintiff signed by the defendants. It has been decided that if a man draw up an agreement in his own handwriting, beginning " I, A. B. agree, &c." and leave a place for a signature at the bottom, but never sign it, it may be considered as a note or memorandum in writing within the statute. And yet it is impossible not to see that the insertion of the name at the beginning was not intended to be a signature, and that the paper was meant to be incomplete until it was further signed. This last case is stronger than the one now before us, and affords an answer to the argument that this bill of parcels was not delivered as a note or memorandum of the contract.

Per CURIAM :

Rule discharged.

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(2 Bos. & P. 240—243.)

1800.
June 28.

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In a declaration on a policy of insurance the plaintiff averred that Messrs. H. at the time of effecting the policy and at the time of the loss, were interested in the cargo which was the subject of the insurance "to a large amount, to wit, to the amount of all the money ever insured thereon;" at the trial it appeared that previous to effecting the policy, Messrs. H. had admitted another mercantile house to a joint concern in the cargo insured. Held that the averment was supported by the evidence.†

THIS was an action on a policy of insurance on the ship *Margaret* and a cargo of corn, at and from Dundee to Chichester, effected by the plaintiff as agent of Messrs. Hyde & Hobbs. In the declaration it was averred, "that certain persons using trade and commerce under the style and firm of Messrs. Hyde & Hobbs, were at the time of loading the said corn on board the said ship as aforesaid and at the time of subscribing the said writing or policy of insurance, and from thenceforth until the time of the loss hereinafter mentioned interested in the said corn to a large amount, to wit, to the amount of all the money ever insured thereon, and that the said writing or policy of assurance so made in the name of the plaintiff, was made to and for the use, risk, benefit, and account of them the said Messrs. Hyde & Hobbs to wit, at, &c."

At the trial before Lord Eldon, Ch. J., at the Guildhall sittings after last Easter Term, it appeared in evidence that Messrs. Hyde & Hobbs who were merchants at Chichester, had, through the agency of the plaintiff, purchased a certain quantity of corn on their own account; that on the 27th of December, 1798, they informed the plaintiff by letter, that

† In *Ebworth v. Alliance Marine Insurance Co.* (1873) L. R. 8 C. P. 596, 42 L. J. C. P. 305, 644, BRETT, J. in his written judgment is reported to have said of the above case (*Page v. Fry*) that in *Cohen v. Hannam* (1813), 5 Taunt. 101, Lord [*sic*] MANSFIELD intended to overrule it. The authorities are conflicting, and *non constat* that Sir James Mansfield's

authority, if he did mean to overrule Lord Eldon's judgment, is to be followed. In the above-mentioned case of *Ebworth, &c.*, the Court were equally divided, BOVILL, Ch. J. and DENMAN, J. affirming the insurable interest, and KEATING and BRETT, J.J. denying it. That case will furnish a clue to all the authorities.—R. C.

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thinking the engagement might perhaps be too large for themselves, they had offered another house of the name of Hacks a joint concern in the corn, which the latter had accepted; and at the same time directed the plaintiff to effect an insurance on the cargo, which he accordingly did on the 28th January, 1799. The invoices were made out to Hyde & Hobbs, and payment for the cargo was made by them. It was objected on the part of the defendant, that the evidence contradicted the averment in the declaration, that the whole interest in the cargo insured was in Messrs. Hyde & Hobbs. His Lordship directed the jury to find a verdict for the plaintiff, but gave leave to the defendant to move for a nonsuit.

Accordingly a rule *nisi* for that purpose having been obtained upon a former day;

Lens, Serjt. now shewed cause:

[*241] The whole question in this case is, Whether the variance between the averment of interest in the *declaration and the interest proved be material? Under the 19 Geo. II. c. 37, it is undoubtedly necessary that the party for whom the policy is effected should be really interested, and it has been the practice since that statute to aver the interest. It seems however to be doubtful whether it be necessary so to do: the effect of the statute is not to make any additional averment in the declaration necessary, but only to throw upon the plaintiff the burden of proving that the parties for whose benefit the policy is made are interested within the meaning of the statute. In this case the objection is not that Messrs. Hyde & Hobbs are not interested, but that their interest is not properly averred. If then the averment in question were unnecessary, it will not prevent the plaintiff from recovering, being alleged under a *scilicet*; for as it does not relate to matters that are part of the contract, it is not to be considered as a material averment.† At any rate this averment need not be construed so strictly as to exclude the interest of all other persons besides Messrs. Hyde & Hobbs. The substantial part of the averment is, that

† *Frith v. Gray*, cit. in the note to *Drewry v. Twiss*, 4 T. R. 561, and *Peppin v. Solomon*, 5 T. R. 496.

Messrs. Hyde & Hobbs were interested to a large amount, and indeed the other party who was partly interested with them had only an equitable claim on the proceeds. The *primâ facie* interest is in those persons who paid for the cargo. In *Page v. Rogers*, Park Insur. 402, it was averred that the plaintiff was possessed of one-third of the ship insured, and it appearing that he had at one time purchased the whole ship, it was objected that as there was no evidence of his having since parted with two thirds, the allegation was not made out; but Lord MANSFIELD overruled the objection.

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Shepherd and Best, Serjts. contra.

Whether under the 19 Geo. II. it be necessary to aver the plaintiff's interest, is not the question here; but the objection is, that the plaintiff has stated upon the record that an interest exists in certain persons in whom it is not, and that having so stated it upon record, he ought to have proved it. The true way of determining whether an unnecessary averment need be proved, is to consider whether if referred to the Prothonotary it could be struck out as impertinent. *Bristow v. Wright*, Doug. 667. In *Hare v. Cater*, Cowp. 766, where it was averred that the defendant was assignee of all the premises, and it turned out that he was assignee of a part only, the variance was held fatal. Now the necessary construction of this averment is, that the exclusive interest was in Messrs. Hyde & Hobbs. It can make no difference in the case whether Messrs. *Hyde & Hobbs purchased the cargo in their own name for others, or having purchased it on their own account they afterwards admitted others to a joint concern in it; now in the former case it is clear that if interest were averred to be in themselves, the variance would be fatal. The parties whom they admitted into the concern may be considered as partners in the transaction; they might have insured their proportion as such, and might have averred their interest in that proportion. The averment of the plaintiff therefore which excludes the interest of any person except Messrs. Hyde & Hobbs is untrue.

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LORD ELDON, Ch. J. :

The question is, Whether Messrs. Hyde & Hobbs had such

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an interest in the whole cargo as will support the averment in question? An insurable interest is a very different interest from most others that can be stated. In *Le Cras v. Hughes*[†] it is very certain that the party insured had no interest in the subject of the insurance according to the common understanding of the word interest; for the prize taken not coming within the terms of the Act of Parliament, and consequently not within the terms of the proclamation, was completely at the disposal of the Crown. In that case, as counsel for the defendant, I pressed upon Lord MANSFIELD the authority of a case before Lord BATHURST assisted by Sir Thomas Sewell, where the next of kin of a lunatic applied to the Court of Chancery praying that the evidence of his being the next of kin might be perpetuated, and stating that he had such an interest in the estate as the Court might take notice of. The application however was rejected on the ground of want of interest; and yet the interest in that case would generally be understood to be much more certain than that reasonable expectation on which *Le Cras v. Hughes* was decided. So in the case of the Dutch commissioners‡ which was lately decided, it is very difficult to define what their interest was, and yet they were held to have an insurable interest. My opinion therefore upon this case is very clear; I think the plaintiff had a sufficient interest throughout the entirety of this cargo, notwithstanding other persons had a beneficial interest in a part to support the averment in this declaration.

HEATH, J. :

[243] I do not see why a joint-tenant or a tenant in common has not such an interest in the entirety as will entitle him to insure. A policy made by a person so interested is not to be considered as a wager policy.

ROOKE, J. :

I think that Messrs. Hyde & Hobbs had such an interest in the cargo as will answer the terms of the averment.

CHAMBRE, J. :

The averment in substance is nothing more than that the

[†] Park Insur. 269.

[‡] *Crawford v. Hunter*, 4 R. R. 576, 8 T. R. 13.

parties for whose benefit the insurance was made, had an interest in the subject of that insurance. They are not bound by the terms of the averment to shew any thing more than that they have an interest, and if they shew an interest to the extent of one hundredth part of the cargo it will be sufficient. The spirit of the 19 G. II. only requires that the policy shall not be a gaming policy.

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Rule discharged.

HANDCOCK v. BAKER AND THREE OTHERS.

(2 Bos. & P. 260—265.)

1800.
July 1.

A private person may justify breaking and entering the plaintiff's house and imprisoning his person, to prevent him from committing murder on his wife.

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TRESPASS for breaking the plaintiff's dwelling-house and assaulting him therein, and dragging him out of bed, and forcing him without clothes out of his house along the public street, and beating and imprisoning him without cause.

Two of the defendants suffered judgment by default, and the other two pleaded, 1st, not guilty: 2ndly, that the plaintiff in the said dwelling-house broke the peace and assaulted his wife, and purposed to have feloniously killed and slain her, and was on the point of so doing; and that her life being in great danger she cried murder and called for assistance; whereupon the defendants, for the preservation of the peace, and to prevent the plaintiff from so killing and slaying his wife, and committing the said felony, endeavoured to enter by the door, and knocked thereat; and because the same was fastened, and there was reasonable cause to presume that the wife's life could not have been otherwise preserved than by immediately breaking open the door and entering the said dwelling-house, and they could not otherwise obtain possession, they did for that purpose break and enter the said dwelling-house, and somewhat break, &c. doing as little damage as possible, and gently laid hands on the plaintiff, and prevented him from further assaulting and feloniously killing and slaying his said wife; and for the same purpose and also for that of taking and delivering the plaintiff

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to a constable, to be by him taken before a justice, and dealt with according to law, kept and detained him a short and reasonable time in that behalf, and because he had not then proper and reasonable clothes on him, took their hands off from him, and permitted him to enter a bed-chamber, and to remain there a reasonable time, that he might put on such clothes, which he might have done; and because he did not nor would so do, but wholly refused and went into bed there, and remained there at the end of such reasonable time, and would not quit the same, although thereto requested, the defendants for the *same purposes as they so kept and detained the plaintiff as above-mentioned, there being then no reasonable ground for presuming that he had changed his purpose of further assaulting and feloniously slaying his said wife, entered the bed-chamber in order for those purposes to take him therefrom, whereupon the plaintiff assaulted and would have beat the said defendants if they had not defended themselves, which they did, and if any damage happened to the plaintiff it was occasioned by his own assault, and the defendants for the purposes in that behalf aforesaid, gently laid hands upon the plaintiff and took him from the bed and out of the dwelling-house along the public streets for a reasonable time, and kept and detained him for a short and reasonable time for those purposes, till they could find a constable, and as soon as they could find a constable delivered him to the constable for the purpose in that behalf aforesaid.

The plaintiff replied *de injuria sua propria*, and by way of new assignment pleaded, that he sued out his writ and declared as well for the trespasses justified, as also for that the defendants at the times when, &c. beat and ill-treated the plaintiff with much greater violence and imprisoned him for a longer time than was necessary and proper for any of the purposes in the plea mentioned.

Issue having been joined on the replication and new assignment, the cause was tried before GROSE, J., at the last Spring assizes for Norfolk, when the jury found for the plaintiff on the general issue, and for the defendants on the special justification.

In Easter Term last a rule *nisi* was obtained calling on the

defendants to shew cause why the judgment for the defendants on the special justification should not be arrested, and a verdict entered for the plaintiff on the general issue, with 1s. damages. The case having stood over till this term,

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Shepherd and Williams, Serjts. now shewed cause, and contended that if the defendants were justified in entering the plaintiff's house and preventing him from killing his wife in the first instance, they were also justified in taking the proper means to prevent him from accomplishing that purpose at any time while the same intent continued; that after verdict, the allegation that "there was no reasonable ground for presuming that he had changed his purpose of further assaulting and feloniously slaying his said wife" must be taken to have been proved; they cited 9 Ed. IV. 26, b, Bro. Ab. tit. Trespass, pl. 184, where to trespass for assault and imprisonment the defendant *pleaded, that the plaintiff was lying in wait in the highway to rob the King's subjects, that one Alice was riding on the same highway, against whom the plaintiff drew his sword and commanded her to deliver her purse, whereupon she levied hue and cry, that the defendant was riding there and heard the cry, and returned and took the plaintiff, and because there were no stocks in the vill he carried him to S. and there delivered him to the constable; and the plea was held good by the whole Court, and *Moile* said, if one say to me, "See this man, I will certainly kill him," in this case I may hold him so that he do not kill the man, and this holding is no imprisonment; † they also referred to 22 Ed. IV. 45, b, 2 Rol. Ab. tit. Trespass, E. IV. where it is said by *Fairfax*, "If you see two men fighting so that one may perhaps kill the other, it is legal for you to part them and to put one in your house till his passion be passed."

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Sellon and Bayley, Serjts. in support of the rule observed that the cases were distinguishable from the case in question inasmuch as this was a case of interference between husband and wife, the former of whom has to a certain extent the power of

† In that case it is also said by *Needham*, "In these cases, he may arrest and commit to gaol if he intends to do a felonious act."

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correcting the latter; that although the defendants, if they had seen the wife in actual danger, might perhaps have been justified; yet without any warrant of constable they could not interfere by way of prevention, merely because the intention continued; that the law has provided a remedy for the wife in case the husband threaten to beat or to kill her; she may either have a writ of *supplicavit* out of Chancery, F. N. B. 80, or exhibit articles of the peace in the King's Bench; that in this case it did not appear even that the wife was present at the time when the plaintiff was taken out of bed; whereas it was necessary for the defendants to allege, not only that the plaintiff had the intent but the power to kill his wife: and that in order to justify the imprisonment, they should also have averred that the intention continued during the whole time in which the plaintiff was detained by the defendants.

LORD ELDON, Ch. J.:

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If the reasoning be good that a wife ought to apply for assistance to those Courts where the law has provided assistance for her, it will equally apply to the first entry of the house by the defendants, as to the subsequent assault and imprisonment which is stated to have taken place in the bed-room. *I think, however, that a wife is only bound to apply to those remedies, where it is probable that the injury to be apprehended will be prevented by such application. In this case the plaintiff being about to commit a felony by killing and slaying his wife, the defendants interfered by breaking and entering the house in order to prevent the execution of that intent: and "for the same purposes," that is, with a view to prevent the plaintiff from killing and slaying his wife, they afterwards committed the injury complained of in the bed-room, into which they had permitted him to enter in order to put on necessary clothes. It is stated that there was no reasonable ground for presuming that the plaintiff had changed his purpose; and it is argued that it ought to have been averred that his purpose actually continued: but if the preceding allegation be true, that the defendants entered the bed-room for the same purposes for which they had previously entered the house, the latter allegation was unneces-

sary ; since the averment that it was for the same purposes sufficiently brought the question before the jury, Whether or not the defendants [entered] into the bed-chamber and detained the plaintiff for the purpose of preventing him from killing and slaying his wife ? It is not difficult to conceive that under some circumstances it might be more especially the defendants' duty to interfere in that manner. Suppose A. endeavour to lay hold of B. who is in pursuit of C. with an intent to kill him, and B. thereupon ceases to pursue with the view of effecting his purpose with more cunning, the act of ceasing to run, so far from being evidence of an intention to desist from his purpose, might afford strong evidence of an intention to prosecute it with more effect ; in which case the detention of B. would be justified. In this case the jury were competent to consider whether under all the circumstances of the case, including the presence or absence of the wife, the plaintiff got into bed with a view of more effectually executing his intent to kill his wife. In fact the jury have found that the defendants kept and detained the plaintiff after he had gone into the bed-room for the same purposes for which they kept and detained him before. With respect to the averment which has been supposed to be necessary, it is sufficient to answer, that after verdict it must be presumed that every thing is proved which is necessary to support the verdict ; and the jury have found that it was necessary for the preservation of the woman's life that the defendants should do what they did.

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HEATH, J. :

I am of the same opinion. It is a matter of the last consequence that it should be known upon what occasions by-standers may interfere to prevent felony. In the riots which took place in the year 1780, this matter was much misunderstood, and a general persuasion prevailed that no indifferent person could interpose without the authority of a magistrate ; in consequence of which much mischief was done, which might otherwise have been prevented. In this case the defendants broke and entered the plaintiff's house in order to prevent the commission of murder, and that seems to have been admitted to be a good justification. The only dispute therefore turns on the propriety of

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ROOKE, J. :

[265] I am of the same opinion. It is highly important that bystanders should know when they are authorized to interfere. In this case the life of the wife was in danger from the act of the husband. The defendants therefore were justified in breaking open the house, and doing what was necessary for the preservation of her life. The jury find that they have done this.

CHAMBRE, J. :

There is a great difference between the right of a private person in cases of intended felony and of breach of the peace. It is lawful for a private person to do any thing to prevent the perpetration of a felony. In this case it is stated that the plaintiff purposed feloniously to kill and slay his wife, to prevent which the defendants interfered in the manner stated in the plea. The justification has been found by the verdict ; and the defendants therefore are entitled to the judgment of the Court.

Rule discharged.

C. P. MICHAELMAS TERM.

SINGLETON AND OTHERS, ASSIGNEES OF HOWELL, v.
BUTLER.

(2 Bos. & P. 283—264.)

1800.
Nov. 11.

[283]

The acceptor of a bill of exchange two days before the expiration of the time for which the bill was originally drawn, called upon the indorser and informed him privately that he was insolvent; the indorser insisted on being paid the amount of the bill, offering at the same time to become security to the creditors for so much as the estate should produce, whereupon the acceptor paid it, and four days after became bankrupt; it also appeared that the bill had been altered so as to make it fall due before this transaction, but without the defendant's knowledge. Held that this was sufficient proof of fraudulent preference to defeat the payment of the bill.†

THIS was an action for money had and received.

At the trial before Lord Eldon, Ch. J. at the Guildhall sittings after last Trinity Term the following case was proved: The defendant having drawn a bill of exchange on Howell the bankrupt, dated the 1st of March, 1796, payable to his own order three months after date, it was accepted by Howell, and indorsed by the defendant to his bankers. On the 2nd of June, which was two days before the bill would become due as it was originally drawn, Howell came to the defendant and told him that in consequence of several houses having failed he had lost large sums of money, and his bills had been returned upon him; and he informed the defendant as his friend (but informed no other person thereof) that his affairs were bad, and would not pay above 10s. in the pound. Upon this the defendant said that Howell must pay his bill, and that if he would, he the defendant

† The question of fraudulent preference has been much discussed in recent cases, but the question has usually turned upon "pressure." There seems, however, nothing to detract from the authority of this decision in the case where the due date is anticipated. The following

are some of the most recent cases on the subject:—*Ex parte Hall, In re Cooper* (C. A. 1882) 19 Ch. D. 580, 51 L. J. Ch. 556; *Ex parte Griffith, In re Wilcoron* (C. A. 1883) 23 Ch. D. 69, 52 L. J. Ch. 717; *Ex parte Hill, In re Bird* (C. A. 1883) 23 Ch. D. 695, 52 L. J. Ch. 903.—R. C.

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would be security to Howell's creditors for so much as the estate should produce if they agreed to a composition. Howell accordingly paid the bill, and on the 5th of June became bankrupt. It also appeared that the date of the bill had been altered from the 1st to the 21st of March, and that the time of payment had been altered from three months after date to two months after date. There was no evidence however to shew by whom this alteration was made, or that the defendant had any knowledge of it, but the circumstances of the case rather afforded a presumption that he did not. His Lordship observed to the jury that this was a bargain for a fraudulent preference, the consideration of which was of no value; that the circumstance of the bankrupt having called upon the defendant two days before the bill became due, and after disclosing his situation having acceded to the defendant's offer, afforded strong ground for them to infer fraud, and that the inference of fraud as far as related to the bankrupt † was rather strengthened by the alteration which had taken place in the date and *time of payment of the bill. The jury found a verdict for the plaintiffs for the amount of the money received by the defendant on the bill.

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Shepherd, Serjt. now moved for a rule calling on the plaintiffs to shew cause why there should not be a new trial, contending that the preference given to the defendant was not voluntary, inasmuch as the defendant had insisted on having the bill paid, and that it was not necessary there should be any threats of legal process to rebut the presumption of fraudulent preference. He cited *Smith v. Payne*, 6 T. R. 152, where a security given to a creditor by a debtor at the mere instance of the former, but without any threats of an arrest, was held valid, though the debtor himself informed the creditor of the bad situation of his affairs.

Lord ELDON, Ch. J. having stated the case to the Court with his directions thereupon, declared himself of the same opinion which he gave at the trial, and distinguished this from the case

† But as to this point observe the effect of the saving clause in more recent Acts. *Butcher v. Stead* (H.

L. 1876) L. R. 7 H. L. 839, 44 L. J. Bk. 129, 24 W. R. 463.—R. C.

of *Smith v. Payne*, because there the creditor came to the debtor, and the security was taken for a debt actually due.

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HEATH, ROOKE, and CHAMBRE, JJ. concurring with his Lordship, *Shepherd* took nothing by his motion.

THOMPSON v. LADY LAWLEY AND OTHERS.

(2 Bos. & P. 303—319.)

1800.
Nov. 24.

[303]

Under a general devise of all manors, messuages, lands, tenements and hereditaments, leasehold messuages will not pass, unless it appear to have been the evident intent of the devisor that they should pass.

THIS was a case sent by the Lord Chancellor for the opinion of this Court.

Bailby Thompson, Esq. being seised in fee of the manor of Wheldrake, in the county of York, and other real estates, and also possessed of a considerable personal estate, including among other things, two leasehold houses, one situate at Putney in Surrey, and the other in Mortimer Street, Cavendish Square, holden on beneficial leases (in each of which about 70 years were unexpired,†) on the 28th May, 1794, duly made his will, attested so as to pass real estates. After directing that his funeral expenses debts and legacies should be paid out of his personal estate, but if his personal estate should not be sufficient to pay the same, his real estate should be charged with the deficiency, he gave and devised his manor of Wheldrake and all other his manors messuages lands tenements and hereditaments to trustees therein named and their heirs to the uses upon and for the trusts intents and purposes therein mentioned, that is to say, as to his said manor of Wheldrake, and all his other tenements and hereditaments in the parish of Wheldrake to the intent that his wife should receive thereout during *her life the yearly sum of 200*l.* in addition to the yearly sum of 800*l.* provided for her by his marriage settlement, and that certain other persons therein named should receive the annuities thereby

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† This fact was admitted though the case, though many parts relied not stated in the case, and indeed as upon in the judgment were not in the whole will was taken as part of introduced at first, they are now added.

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provided for them, and he then devised as follows, that is to say
“ as for and concerning the said manors and messuages and other hereditaments so charged with the said annuities with all their rights members and appurtenances and as for and concerning all other his manors messuages lands tenements and hereditaments with their rights members and appurtenances in the said county of York or elsewhere in the kingdom of Great Britain, to the use of his first and other sons in tail male and for want of such issue to the use of his first and other sons in tail general, remainder to his daughters in tail as tenants in common if more than one, with cross remainders, and for want of such issue to the use of his brother Richard Thompson and his assigns for his life without impeachment of waste, remainder to the said trustees to preserve contingent remainders, remainder to the use of the first and other sons of the said Richard Thompson successively in tail male, remainder to the use of Paul Beilby Lawley, the third son of his sister, Lady Lawley, for life, remainder to his first and other sons in tail male, remainder to the use of Francis Lawley, the second son of his said sister for life, remainder to his first and other sons in tail male, remainder to the use of Sir Robert Lawley, the eldest son of his said sister for life, remainder to his first and other sons in tail male, with the ultimate remainder to his own right heirs.” Then followed a proviso, that if P. B. Lawley, or F. Lawley should succeed to the premises they should take the name and arms of Thompson, and other provisoes empowering the several devisees to jointure and to raise portions by demise or mortgage, redeemable by the person who for the time being should be entitled to the freehold and inheritance. He then limited an estate in Nottinghamshire to other persons, and after having declared that it was his intention to have given his wife the choice of any one of his mansion-houses in Yorkshire or London, or the house that he had lately purchased at Putney, but that she had declined the acceptance of either of them, and would have no house of her own to go to after his decease, gave her therefore 5,000*l*. He then, after giving several legacies, expressed himself as follows, “ Lastly, I give and bequeath all my monies, securities for money, goods, chattels and effects, and all other my personal estate not

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hereinbefore by me disposed of, or to be disposed of by any codicil or codicils to this *my will unto my said brother Richard Thompson and unto my sister Lady Lawley in equal shares and proportions :” and he appointed his said brother and sister executor and executrix of his will.—The testator died on the 10th June, 1799, without having revoked his will. The question for the opinion of the Court was, Whether the leasehold houses and premises late belonging to the testator in Mortimer-Street, Cavendish-Square, and at Putney in Surrey, passed by his will under the general devise of all his manors, messuages, lands, tenements and hereditaments, with their rights, members and appurtenances in the county of York or elsewhere in the kingdom of Great Britain ?

Bayley, Serjt. for the plaintiff :

In the first place the leasehold property can only pass by way of executory devise, and being limited after an indefinite failure of issue, the limitation as an executory devise is too remote. Independent of this consideration, however, it may be stated as a general proposition, established by a long series of cases, that where a man is possessed of freehold and leasehold property, the leasehold will not pass by a general devise applicable to freehold, unless an intention that they should pass can be collected from the face of the will, or from the nature of the leaseholds themselves. It was resolved in *Rose v. Bartlett*, Cro. Car. 292, “ that if a man hath lands in fee, and lands for years, and deviseth all his lands and tenements, the fee-simple lands pass only and not the lease for years : and if a man hath a lease for years and no fee-simple, and deviseth all his lands and tenements, the lease for years passeth : for otherwise the will should be merely void.” † This case is a leading authority, and the doctrine has been recognised in a variety of subsequent decisions. The case of *Davis v. Gibbs*, where the same proposition was adopted, was first decided at the Rolls, as appears from Fitzg. 116, and that decision was afterwards confirmed by the LORD CHANCELLOR, and on an appeal from him, by the House of Lords, 3 P. Wms. 26. The words used

† Indeed leasehold houses will no freehold houses. *Day v. Trigg*, 1 P. Wms. 286.
 pass under a devise of all the testator's freehold houses in A. if he had

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in that case were particularly strong, being “manors, messuages, lands, tenements, hereditaments, and real estates whatsoever of which the testatrix was any ways seised or entitled to,” which last expression might seem to apply to leasehold estate. Lord HARDWICKE in *Knotsford v. Gardner*, 2 Atk. 450, cites the case of *Rose v. Bartlett*, and adds, that although in the case before him he had no doubt at all of the intention of the testator, yet the rule of law must prevail, and directed an issue to try whether the testator at the time of making his will *had both freehold and leasehold estates. The opinion of Lord HARDWICKE respecting this rule of law is shewn still more strongly in *Chapman v. Hart*, 1 Ves. Sen. 271, for the will in that case having been executed in the presence of two witnesses only could not pass the real estate, and yet his Lordship held that the devise of all his lands and tenements must, according to *Rose v. Bartlett*, be confined to the freehold estates, and that therefore the leasehold would not pass. These cases are confirmed by *Pistol v. Riccardson*, K. B. Hil. 1784, 2 Cox’s P. Wms. 459, n. 1, 1 H. Bl. 26, *in notis*, S. C. where Lord MANSFIELD observed, that a system of legal construction had been established by former cases, especially *Rose v. Bartlett*, and *Davis v. Gibbs*, which precluded the Court from considering the intention of the testator on the words of the devise as they otherwise might have done, and bound them in their decision of the principal case. Yet in that devise the words “seised or interested in or entitled unto” might seem applicable to leasehold as well as freehold property. It was indeed lamented by Lord KENYON in *Lane v. Lord Stanhope*, 6 Term Rep. 353,† that the case of *Addis v. Clement*, 2 P. Wms. 456, was not cited in *Pistol v. Riccardson*, since his Lordship seemed to think that Lord MANSFIELD might have been induced by the authority of that case to have decided otherwise. But it appears from a manuscript note of *Pistol v. Riccardson*, that the case of *Turner v. Husler*,‡ which proceeded on the authority of *Addis v. Clement*, was noticed by Lord MANSFIELD in his judgment, who received his account of it from Mr. Baron EYRE: it is therefore to be inferred, that the case of *Addis v. Clement*, had it been cited, would not have altered his Lordship’s opinion. It is to be

† 3 R. R. 198.

‡ Reported 1 Br. C. C. 78.

observed, however, that the case of *Addis v. Clement* is very distinguishable from the present. Lord Chancellor King observed, that the words “possessed of or interested in” properly referred to a leasehold, and expressly distinguished the case before him from *Rose v. Bartlett* on that ground; and his Lordship further relied on the circumstance of the leaseholds being perpetually renewable, which he thought might have induced the testator to look upon himself as having a kind of inheritance. This last circumstance also distinguishes *Turner v. Husler* from the present case; for there the leasehold tithes were perpetually renewable without fine, and Mr. Baron EYRE’s opinion appears to have been founded on the ground of the testator’s intention to pass the leaseholds, inferring that the resemblance which those particular leaseholds bore to an inheritance made the testator forget the distinction. With respect to *Lane v. Lord Stanhope* it might be sufficient to say, that the word “farm” there used, was particularly *descriptive of leasehold property, if it was not clearly distinguished from the present case by another circumstance, namely, that the freehold and leasehold property was so blended together that it was quite impossible to suppose that the testator could have intended to separate them. The case of *Lowther v. Cavendish*, Amb. 356, was decided simply on the ground of intention apparent on the face of the will that the leaseholds should pass. In the present case it is impossible to discover any intention of the testator expressed upon the face of his will to pass the leasehold. All the limitations are applicable to freehold property only: and the words “executors and administrators” never once occur. Besides, as the lands, &c. are limited by the general devise to trustees to uses, if the leaseholds were included in this devise, the legal property of the freehold would go to one person and of the leasehold to another; for the use of the former would be executed in the *cestui que use* by the statute, whereas the legal estate in the latter would remain in the trustees.

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Runnington, Serjt. for the defendants:

The general terms used in the clause in question are sufficient to pass the leasehold together with the freehold property. Though in *Rose v. Bartlett* the language used is undoubtedly very

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strong in support of the argument urged on the other side, yet subsequent to that case the rule has been varied in many instances, and the Courts have inclined to decide, that where they can collect from the will that it was the intent of the testator to pass his leasehold together with his freehold property under a general clause of this kind, the leasehold is passed accordingly. In *Turner v. Husler* Mr. Baron EYRE observes, that the determination of *Rose v. Bartlett* was very early, and that he was led to think it arose from the old idea of the dignity of the freehold, and the small value of the *interesse termini*; but that from the change of circumstances the rule was become unsatisfactory. *Davis v. Gibbs* was decided on the intent of the party devising, the clause in dispute being a devise of all “manors messuages lands tenements hereditaments and real estate” and there being another clause under which the leasehold evidently passed. Though the general rule is recognized in *Knotsford v. Gardner* and *Chapman v. Hart*, yet in *Pistol v. Riccardson* the observation of Lord MANSFIELD, that nothing appeared in the will indicating an intention to pass the leaseholds, seems to shew, that if any such intention could have been discovered, his Lordship would have held the words of the devise sufficiently comprehensive. Certain it is that *Addis v. Clement* was not referred to in that case; and in *Lane v. Lord Stanhope* Lord KENYON *observes, that in *Pistol v. Riccardson* Lord MANSFIELD seemed to feel himself pressed by a torrent of authorities, and that if *Addis v. Clement* had then been mentioned the Court would have decided the other way with less reluctance, and that the ground of determination was, that all the words there used had received in other cases a certain technical construction. That case of *Lane v. Lord Stanhope*, if correct, has put the question at rest, inasmuch as the word “farms” was there held to pass the leaseholds, as it appeared from the circumstances of the case, that the testator must have intended them to pass. The strict rule therefore laid down in *Rose v. Bartlett* is no longer the governing principle, but the intention of the testator must prevail, and if the words of the will are sufficiently general to include leaseholds, the Court will not restrain them. Here the words are as general as possible, being his “manors messuages lands tene-

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ments and hereditaments," and if in *Turner v. Husler* the word "tithes," and in *Lane v. Lord Stanhope*† the word "farms," were held to carry leaseholds, why should not the word "messuages" in this case? Here the testator had 70 years to run in the leaseholds, which amounting to the value of the whole fee, he might look upon them in the light of freehold property. It has been objected that the strict limitations in this will not being applicable to leasehold property, shew that the testator did not intend the leaseholds to pass in a clause the contents of which are made subject to those limitations: but the same limitations existed in those equity cases where due weight was given to intention. Having given 5,000*l.* to his wife in lieu of these very leaseholds, it is clear that he had them in contemplation at the time of making his will, and if he had not supposed them to pass under the general clause they would have been specifically mentioned in the residuary clause.

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LORD ELDON, Ch. J.:

Though the Court is not called upon in this case to state the reasons for the certificate, which it is disposed to return to the Lord Chancellor, yet, as it has not been unusual upon similar occasions to mention the grounds upon which the opinion of the Court has proceeded, I shall follow the example of Lord KENYON in *Lane v. Lord Stanhope*,† and state my reasons for thinking that the leaseholds do not pass under the general devise of the testator's manors, messuages, &c. I adopt the words of his Lordship in that case: "It is our duty in construing a will to give effect to the deviser's intention as far as we can consistently with the rules of law, not conjecturing but expounding his will from the words used." And I am particularly impressed with the *latter expression "not conjecturing, but expounding his will from the words used." I will first consider this will, as if the construction was unprejudiced by any rule of law, or by any decisions in which distinctions respecting such rules may have been taken. When we find limitations in a will, inapplicable to personal estate, though we are not thereby authorised to say that the personal estate shall not pass, provided the testator has used

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† 3 R. R. 197, 6 T. R. 345.

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words clearly sufficient to pass it; yet the acknowledged inapplicability of those limitations to personal estate is a circumstance from which the intent may be collected if the words of devise are ambiguous. In an accurate sense when a man says "my lands and hereditaments" he means those which are throughout his own. When therefore we see limitations which apply to real estate as distinguished from personal estate, or even when we find that by holding the latter to be included in the general devise the wish imputed to the testator to give it to the same person as the freehold may not, by virtue of such limitations, be gratified for above one moment; we may consider the nature of the limitations as affording strong evidence that the testator really had not the intention that the personal estate should pass. I consider the whole of this will as part of the case referred. I find no circumstance stated which goes beyond the mere fact, that the testator was possessed of two leasehold houses for terms of about seventy years. It does not appear that there was any equitable right of renewal, nor were the premises in question blended in enjoyment or otherwise, with any freehold land; there is no difficulty in distinguishing them from each other; they have never been demised together at one rent reserved to heirs; they are short terms. No one of those particular circumstances which were relied upon in former cases exists in this; it is the simple case of terms for years, and a case of property, *primâ facie*, that sort of property which a disposition of personal estate must be intended to pass. In this will, in the first place, the testator directs that his debts and funeral expenses shall be paid out of his personal estate, but if that shall not be sufficient, he charges his real estate with the deficiency. Here in the beginning of the will then a distinction between real and personal estate is introduced. In the last clause of the will he devises "all his money securities for money goods chattels effects and all other his personal estate not therein before disposed of or to be disposed of by any codicil." It has been observed, that by the words "personal estate," in this last clause, must be meant personalty *ejusdem generis* with money, &c. But am I conjecturing, or am I *expounding when I say that he meant one thing by the words "personal estate" at the

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beginning of the will, and another by the same words at the end? Look at this in another point of view; the general rule respecting the application of assets is very much like that which the testator has here appointed. First, the personal estate is to be applied, and then the real. But the personal estate so to be applied is the personal estate not specifically disposed of. Now if the leaseholds in question passed with the freeholds, then those leaseholds are specifically disposed of; and if the personal estate not specifically disposed of should happen to be insufficient for the payment of debts, out of what fund and in what manner are we to suppose that the testator has directed them to be paid? He has settled his different freehold estates on different persons. If therefore it be necessary to resort to the real estates for payment of debts, a valuation of them must be taken, and they must contribute *pro rata*; but personalty specifically disposed of must also contribute; and then in the construction of a will which says, the personalty is first to be applied, we are, if the general personal estate is insufficient, to consider it as agreeable to the testator's intention, though he has not bequeathed his leasehold estates *eo nomine*, that they should be preserved as anxiously as the freehold, and should only contribute together with them, according to their value. With respect to the word "messuages" as used in this will, it is to be observed, that in the devise of the manor of Wheldrake it is most clearly applied to freehold estate only: and therefore there is no reason to suppose, that when he used the same word in the general clause, under which it is contended that the leaseholds pass together with the freeholds, he meant to apply it in both those species of property. The estates included in the general devise are limited to the issue (if he should have any) of the devisor in tail, with several remainders over: now if the devisor had left a son living at the time of his death, and that son had died instantly afterwards, the leasehold property would have been necessarily separated from the freehold, since the former would have gone to the administrator of such son, and the latter would have vested in the remainder-man. Why are we then to be so anxious to impute intentions to testators, the gratification of which they use means and terms so little calculated to secure? It was observed,

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that the limitation being after failure of issue of his body was too remote: but attending to his real intention, and the case of *Pelham v. Gregory*,† *in the House of Lords, we might hold, that if he had issue, the leasehold would vest in the issue, and if he had none in actual existence at his death, the leasehold, if it vested in the aftertakers, would be subject to be divested as soon as any issue of his should come into actual existence. In that part of the will where a power is given to charge the estates devised with portions for younger children, it is clear he meant the power should extend to all the property which he devised under the general words; but he provides that if such portions shall be raised by demise or mortgage the same shall be redeemable by the person entitled to the freehold and inheritance of the demised or mortgaged premises: he thought therefore that he had an inheritance in the property he devises, and which he gives a power of mortgaging. Then follows the only clause which could suggest any doubt to an unlettered mind; in which the deviser declares that it was his intention to give his wife the choice of one of his mansion-houses in Yorkshire or London, or the house that he had lately purchased at Putney, but that she had declined it, and that he therefore gave her 5,000*l*. Now although the wife might have chosen the Yorkshire house, which was a freehold; yet it is observable that, as his will finally stands, the compensation is taken out of the personal estate: and it seems not unreasonable therefore that the residuary legatees who are to pay that 5,000*l*. should take the leasehold in lieu of it. By the last clause the testator gives "all his personal estate not herein before disposed of, or to be disposed of by any codicil." Now it seems impossible to say, that the words "herein before disposed of" may not be satisfied by the legacies before given; but this testator might mean by a codicil to dispose of those leaseholds, suffering them to pass by the general clause if he made no codicil. As to the argument that the personal estate must mean personalty *ejusdem generis*, I cannot trust my mind with an argument so like a conjecture: the words are large enough to pass personalty of any sort; and I do not understand how that mind reasons, which deems the intention of a testator

† 5 Br. Parl. Cas. 435.

satisfactorily made out by that kind of argument. I was struck with the observation, that as the property is limited to trustees to uses, the statute draws the legal estate in the freeholds out of the trustees, and vests it in the *cestui que use*, whereas the legal estate in the leaseholds remains in the trustees. As to the supposed anxiety of the testator, that the two species of property should go together, it is more usual to demonstrate that anxiety either by directing that the leaseholds shall be enjoyed together with the *freeholds as long as the rules of law and equity will admit, or by introducing very special words and limitations for that purpose, adapted to the nature of the leaseholds. No testator who meant that they should go together, ever made a will under reasonably good advice in its terms so little calculated to produce the intended effect as this testator has done: though in truth a similar observation may be made upon the inefficacy of the terms used to secure such a supposed intention in almost every case, where upon the ground of intention leaseholds have been held to pass under general words. As to the cases; the first mentioned is *Rose v. Bartlett*.† It was supposed in *Turner v. Husler*‡ that the rule there laid down originally obtained on the ground of the small value formerly attached to leasehold interest as opposed to the dignity of the freehold. It may be so, though I doubt whether it was so: but where I do not know the origin of the rule I cannot reason from the supposed causes of the rule, without knowing them, till I allow myself, in that state of uncertainty, to deny effect to the rule. Finding messuages and lands limited to uses inapplicable to leasehold interests, I think I may more safely suppose that the testator intended to pass such messuages and lands as might be limited to such uses. Lord HARDWICKE seems to have considered the rule acknowledged in *Rose v. Bartlett* to have been a rule proceeding on intention, and to have thought that where a testator gives his lands and tenements he must, *primâ facie*, be taken to mean those lands and tenements which are strictly his, viz. those in which he has an inheritance. Whether the rule laid down in *Rose v. Bartlett* were wisely adopted or not, it is unnecessary for us to determine; but that case having once estab-

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† Cro. Car. 292.

‡ 1 Br. C. C. 78.

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lished a general rule, I had rather consent pointedly and avowedly to contradict that rule in terms than to acknowledge it in words and deny it in effect, by raising distinctions which in fact make it impossible for any man to decide in any particular case what is the legal construction of a will as to this point, till he has obtained the authority of a court of law, in a judgment upon the will, for the opinion which he gives. I observe that the rule has not been denied in any of the cases which have followed *Rose v. Bartlett*. Lord HARDWICKE in *Knotsford v. Gardner*† speaks of it with the greatest respect; and indeed Mr. Atkyns seems to make him speak of it in stronger terms than the rule itself will warrant, since he reports his Lordship to have said, that although he had no doubt *of the intention of the testator, yet the rule of law must prevail. In *Chapman v. Hart*, Lord HARDWICKE again recognized the rule, and even carried his respect for it so far, that although the will was executed in such a manner as to carry personal property only, yet as the words of the devise were properly applicable to freehold only, his Lordship would not suppose that the testator by those words intended to pass that species of property which could pass by a will so executed. Both in *Addis v. Clement*,‡ and *Davis v. Gibbs*,§ the rule was expressly acknowledged. It is not my business to consider whether the distinction raised on the former of those cases was fairly sufficient, consistently with the safety of property and titles, to exempt it from the application of the general rule: but when the rule is once admitted, I must decide upon my own conviction respecting its applicability to the particular case which comes before me. No doubt, those who decided the cases in which the general rule has been held not to apply, were satisfied that the circumstances before them were sufficient to warrant the exception, and that the exception could be taken with safety to the rules of property: but it is enough for me to say, that none of the circumstances relied on in those cases are to be found in this. I cannot help adding, that if the principle be just that we are not to conjecture, but to expound, it does appear to me that we do not strictly abide by the rule, that we indulge in what is rather conjecture than exposition, if we are to proceed on suppositions of what the testator may be imagined to have under-

† 2 Atk. 450.

‡ 2 P. Wms. 456.

§ 3 P. Wms. 26.

stood as to the nature of his own property, of what he forgot and of what he remembered concerning it; suppositions not founded in his acts or expressions. It is not very easy, in my judgment, to find a sound distinction, sound as obviously consistent with the safety of titles, between the case of *Addis v. Clement*, and *Davis v. Gibbs*, if the distinction is to rest only upon such words as "possessed of or interested in," and yet the former of those cases does afford a distinction between that and *Pistol v. Riccardson*, aimed at by Mr. Justice LAWRENCE in *Lane v. Lord Stanhope*, viz. that the words "possessed of" occurred in that case, and not in *Pistol v. Riccardson*; and authority has certainly laid stress upon the distinction. Yet it cannot be denied that these words are very frequently, if improperly, used as to freehold as well as leasehold: and if those words follow expressions which, according to the rule, are *prima facie* to be taken to signify freehold, as "lands, tenements, and hereditaments," *are we sure that we are expounding and not conjecturing when we say that the testator intended to apply them both to freehold and leasehold, though his limitations are ill adapted to leasehold property; and very ill adapted to it if meant to secure, as far as may be, the enjoyment of it together with freehold? † And yet the case of *Addis v. Clement* must be understood to proceed upon the word "possessed;" at least the most material reasoning in the judgment proceeds upon it. But the distinction between that case and *Davis v. Gibbs*, and between that case and *Pistol v. Riccardson*, does not rest merely upon such words. The nature of the testator's interest in leaseholds and in renewable leaseholds is very different, and something is due to the consideration, whether the property is or is not blended in enjoyment. It was argued in *Davis v. Gibbs*, that as the testatrix had no freehold interest except in Kent, and the general devise related to Kent, Essex, and Bucks, the chattel interests in the two latter counties must pass in order to satisfy the will: on the other hand it was said, that this clause might be satisfied by the fee-simple in Kent, and that if the chattel interests passed under it, there would be nothing to satisfy the

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† The preceding passage is quoted 47 L. J. Ch. 522, 525, 38 L. T. N. S. 381.—B. C. and applied by FRAY, J. in his judgment in *Holmes v. Milward* (1878)

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word "mortgages" in the last clause relative to the personal estate; and the judgment seems to have turned upon this. It must however be observed, that though when a will speaks of lands, it means lands which the testator has at the time of making the will, and it will pass those and those only; yet when it speaks of personalty, it will pass such as the testator shall have at the time of his death, though he had it not at the time he made his will. It seems singular to insist that the words "mortgages and credits" in that residuary clause as to the personal estate, necessarily meant the mortgage for years, and the extended interest which the testator had at the time of making his will; when it must be admitted that if before his death he had parted with them and acquired others, the words would have passed such others though he had acquired them after he made his will. And it is difficult to admit the consistency of that reasoning, which says that the terms "lands in Kent, Essex and Bucks," are all satisfied by lands in Kent only, though he had a mortgage in Essex and an extended interest in lands in Bucks, and yet at the same time insists that mortgage and extended interest are necessary to satisfy the words "mortgages and credits" in the residuary clause, which would have their operation if the testator had before his death any *other, and had not at his death that very mortgage or that very extended interest. The argument seems to treat a general residuary clause containing an enumeration of particulars, as if it operated only as a specific bequest of such particulars of personalty as the testator had at the time of making the will, answering in description to the particulars enumerated; though it would operate upon those also which he should afterwards acquire and have at his death. In fact it must often happen that where all personal estate is given, and an enumeration of particulars unnecessary, because all personal estate is given, is added, the testator enumerates some particulars which he has, and many which he has not, and arguments drawn from intention founded upon the terms occurring in such enumerations are not perhaps of all arguments the most satisfactory, if in truth they are not the least so. In the cases of *Knotsford v. Gardner*, and *Chapman v. Hart*, Lord HARDWICKE came to very strong decisions in favour

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of the rule in *Rose v. Bartlett*, and considered it at least as a rule not to be departed from without demonstration plain of the intent of the testator; and when we recollect how thoroughly Lord HARDWICKE was versed both in law and equity, it is not to be supposed that he was ignorant either of *Addis v. Clement*, or *Davis v. Gibbs*. Next came the case of *Lowther v. Cavendish*, which appears to me to be very loosely reported by Ambler; and I am not disposed to believe that Lord NORTHINGTON ever made use of the expressions respecting *Rose v. Bartlett*, which are there attributed to him. We all know that he was possessed of great law learning and a very manly mind; and I cannot but think that he would rather have denied the rule altogether, than have set it afloat by treating it with a degree of scorn, and by introducing distinctions calculated to disturb the judgments of his predecessors and remove the landmarks of the law. But be that as it may, the point on which Lord NORTHINGTON put the case was, that it was the obvious intention of the testator that one of his name should take all his estates in one county and another in another county; that his general primary intention was to make one great Cumberland man, and one great Yorkshire man, and that the property in each county, with exceptions, ought to go accordingly. That case therefore is to be considered as a case of exception from the general rule. In *Turner v. Husler*, Mr. Baron EYRE, then sitting for Lord THURLOW, was of opinion, that by the word "tithes," attending to the nature of the testator's interest in them, and conjecturing what *he might think about them, both the freehold and leasehold tithes of the testator might pass. In coming to that decision, however, he lays hold of particular circumstances in the case, such as the perpetual interest in the renewal, but he does not at all deny the general rule in *Rose v. Bartlett*, or say that it is to be no longer considered as an authority in the law. Whether that decision be altogether satisfactory I will not presume to say; but thus much I may observe, that I should have had considerable difficulties in the case; and sitting as a Judge in a court of equity, I should have felt myself much relieved in being able, in conformity to its practice, and out of respect to the decision of Judges and Courts in former times, to have asked the opinion of a modern court of

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law on the subject. This was followed by the case of *Pistol v. Riccardson*, which appears to me to be a case of great authority, Lord MANSFIELD was very unwilling to come to the decision which he ultimately made; the case was twice argued before him. It has been supposed indeed that his Lordship was not aware of the case of *Addis v. Clement*. Whether his Lordship would have come to a different determination had the case of *Addis v. Clement* been cited, or whether any distinction so satisfactory as to be confidently acted upon is to be found between the two cases, I do not feel myself bound to examine: but it does not appear to me that any very useful purpose would have been served by a contrary decision, considering how short a time even in that case the freehold and leasehold estates would probably have gone together. In all the cases, or almost all of them, the testator has had an intention imputed to him that his freehold and leasehold estates should be kept together, and this has been imputed in cases where the will appears to have been skilfully and artificially drawn. Is it possible if a testator had disclosed such an intention to his man of business, that he would have so inadequately expressed that intention as to use the terms occurring in this case, and in many of the other decided cases? I can hardly say that in any one of them there is an attempt by words or limitations to make the leasehold go together with the freehold as far as the rules of law and equity will admit, that is, to render the leasehold inalienable till about the same time at which a recovery can be suffered of the freehold. Why are we to be anxious to impute an intention which, the testator, if he entertained, has expressed in terms so little calculated to give it effect, that the doctrines of law, operating upon the words which he has actually used, will not permit any Court to effectuate it but in a degree *altogether short of the extent to which it is imputed to him? The mode of limiting them so that they may go together is familiar to every man of business; that mode is not pursued in any of the cases I have met with; yet in all those cases the wills are ably and artificially drawn: the inference may be thought to be that the intention had not occurred either to the testators or their men of business. The case of *Lane v. Lord Stanhope*, however, furnishes a principle upon which I am dis-

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posed to decide the present, because it professes to proceed upon the intent. In that case the freehold and leasehold parts were so blended that they were incapable of being distinguished, and they had been enjoyed together from time immemorial. They had been demised as one term under a rent reserved to the lessor and his heirs. This reservation is a fact from which we may infer that the testator thought the whole his inheritance: it is not a case in which we are conjecturing about his thoughts without acts upon his part to serve as the grounds of conjecture. The premises were also held with a right of renewal. The first taker of the real estate was also the residuary legatee of the leasehold estate: if therefore the testator did not intend that the freehold and leasehold should go together, he must have had this special intent, namely, that the first taker should have an estate for life in the freehold part, and under the residuary clause an absolute interest in the leasehold part; from which circumstance this consequence might have arisen, that when the first taker died there would have been a separation of the different parts of a farm stated to be incapable of being distinguished. That difficulty must have been got over; and if it could not be done in any other way, so many acres must have been set apart (according to the rule of equity) for the freehold interest, and so many for the leasehold. The difficulty however was thought to afford a strong ground for inferring the intention of the testator that the whole should pass together, in a case where he had devised the farm as a farm. In truth the devise of a farm as one entire thing, where the testator had a farm composed of these different parts, is perhaps as sound a ground for the judgment as any in the case. With respect to the supposed intent of the testator that the freehold and leasehold should go together, how imperfectly was that secured in this very case! If the first taker for life of the freehold, and who was entitled to the leasehold either for life by virtue of the limitations, or absolutely as residuary legatee, had a son who had come into existence, and continued in it but for *a moment, the intended union of enjoyment would have been instantly severed between his administrator and the remainderman. If the testator had any intention upon the subject, the carelessness of the person who framed his will had

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left it exposed to immediate disappointment, and yet the general tenor of the will bespeaks legal skill in the person who penned it, and skill abundantly competent to secure the execution of the testator's purpose, if he really meant to keep the freehold and leasehold together as long as the law would allow. It is utterly impossible to assert that such an intention is in any reasonable degree effected by the terms of that will. The case of *Rose v. Bartlett*, however, was thought not to apply, because it was conceived that it manifestly appeared not to be the intention of the testator to pass the freeholds only : but it was admitted that if the case had been similar in terms to *Rose v. Bartlett*, the same intention would have been inferred upon the rule of law. The case of *Lane v. Lord Stanhope* was decided on its own circumstances ; but this case not only has none of those circumstances, but is as different in circumstances of fact from *Lane v. Lord Stanhope* as any which ingenuity could state. The rule in *Rose v. Bartlett* is a rule which has been acknowledged for ages, and upon which I shall act until I am informed by the highest authority that I am no longer to regard it. Till I shall be so informed I shall substantially regard it in judgment, for I think it better to overrule it altogether, which I must not do, than to deny to it its effect upon grounds which do not completely satisfy my mind as solid and safe grounds of distinction.

HEATH, J. :

The case has been so fully discussed by my Lord, that I shall state my reason very shortly. I have always understood the rule of law laid down in *Rose v. Bartlett* to be a rule of property not to be shaken ; and I have often heard it cited and recognised. It is a rule founded on intention ; and therefore in the cases cited the Judges have proceeded on intention, and where they could collect that the intention of the testator was that both freehold and leasehold should pass, they have so determined. Thus the cases of *Addis v. Clement*, *Turner v. Husler*, and *Lane v. Lord Stanhope*, whether well or ill decided, have all proceeded on special circumstances from whence the intention was collected. It is sufficient to say that no such circumstances occur in this case. Besides, the testator used the words "messuages" and

“hereditaments” in the same sense; and it is therefore to be inferred, that by the word * “messuages” he could mean those messuages only which were hereditaments. In some places he says “messuages lands tenements and hereditaments,” but in others he says “messuages and other hereditaments.”

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ROOKE, J. :

My opinion is founded on the case of *Rose v. Bartlett*; which I consider as a rule of property not to be shaken. The cases cited in opposition to the rule have all admitted it, but have proceeded on special circumstances. With respect to the rule itself, Lord HARDWICKE expressly said that it was not to be departed from, and Lord MANSFIELD held the same doctrine. I cannot agree that the rule has been so far shaken that the *onus* is to be thrown on the personal representative of shewing that the leaseholds are not intended to pass: on the contrary I think that the leaseholds must be taken not to pass unless special circumstances can be shewn clearly demonstrative of a contrary intent; and no such circumstances are to be found in this case.

CHAMBRE, J. :

Whether we argue this case upon the rule in *Rose v. Bartlett*, or upon the intention of the testator, we must come to the same conclusion. The rule laid down in *Rose v. Bartlett* is now so fully established that all the Courts of Justice are bound to conform to it: it has been considered as in force from the time of Charles the First to the present period, and has been recognised by the highest authority. With respect to the intent of the testator, this case abounds with pregnant circumstances to shew that he did not mean to include the leaseholds in the general devise.

The following certificate was sent to the Lord Chancellor :

“We have heard this case argued by counsel, and attending to the whole of the will of the testator Beilby Thompson, We are of opinion that the leasehold houses and premises in Middlesex and Surrey did not pass by the general devise stated in this question.

“ELDON. G. ROOKE.
“J. HEATH. A. CHAMBRE.”

1800.
Nov. 25.

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(2 Bos. & P. 330—333.)

In an action on a policy of insurance, with a count for money had and received, if the defendant establish as a defence that the risk never commenced, the plaintiff is entitled to a verdict for the premium, though no demand of premium was made by his counsel in opening the case.

ASSUMPSIT on a policy of insurance, with a count for money had and received. The defendant paid no money into Court.

At the trial before Lord Eldon, Ch. J. at the Guildhall sittings after last Easter Term, the case was opened for the plaintiff merely on his right to recover upon the policy. The defence set up was, that the ship was not sea-worthy; and upon this point, without any direct evidence of fraud, the case went to the jury. While they were deliberating upon their verdict, the counsel for the plaintiff observed to his Lordship, that in case the jury should be of opinion that the ship was not sea-worthy, the plaintiff would be entitled to a verdict for a return of premium. The jury having no intimation of this claim brought in their verdict generally for the defendant.

A rule *nisi* having been obtained upon a former day, to enter a verdict for the premium upon the count for money had and received,

Cockell and *Vaughan*, Serjts. shewed cause, and admitted that upon inquiry the practice had been found to vary, with respect to allowing the plaintiff to take a verdict for the premium in cases of this kind, contending that as no mention had been made by the plaintiff in the opening of his case respecting the return of premium, under the apprehension that such a claim might prejudice the jury against him on the principal point, he ought not now to be permitted to set it up; that the defendant had been deprived of the opportunity of contesting the claim by cross-examining the plaintiff's witnesses, or producing evidence on his own part to establish fraud, and that therefore if the plaintiff were now permitted to insist upon it, he would take advantage of his own wrong. They cited the case of *Nesbitt v.*

Whitmore, B. R. E. 40 Geo. III.† where a case having been reserved for the opinion of the Court, in which no mention was made respecting a return of premium, the Court being of opinion with the defendant upon the principal point, did not think proper to direct a verdict to be entered for the plaintiff for the premium, though to prevent another action being brought they subjected the defendant to the terms of paying the premium to the plaintiff on having judgment entered for himself without costs. They also referred to *Mackenzie v. Duff*, Park, Insur. 377.

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Shepherd, *Lens*, and *Bayley*, Serjts. in support of the rule observed, that had they not considered it as the constant practice for the plaintiff in such cases to have a verdict on the count for money had and received, they should have made the claim at an earlier period of the cause; that whenever the defence set up imports that the risk never has commenced, it is a consequence of law that the plaintiff is entitled to a verdict for the return of premium; that if the facts of this case had been stated on a special verdict, the Court would have been bound to enter judgment for the plaintiff. They cited *Burman v. Woodbridge*, Dougl. 781, and *Rothwell v. Cooke*, 1 Bos. & P. 172, and *Hogg v. Horner*, Park, Insur. 377, ed. 4, to shew that the plaintiff is entitled to a verdict, though the right to a return of premium were never mentioned during the progress of the cause; and relied on *Nesbitt v. Whitmore*, where, although judgment was entered for the defendant, he had been compelled to pay the premium to the plaintiff.

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[The Judges having stated their first impressions upon the subject, intimated that they should make inquiries respecting the practice before giving their decision.]

LORD ELDON, Ch. J. on this day said :

We have made inquiries respecting the practice on this subject, and find that Lord KENYON is of opinion that in cases of this kind, the plaintiff is entitled to a verdict for the premium.

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† See this case mentioned with some slight difference, 1 East, p. 97, in *notis* (*ante*, p. 517, and note there).

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Without entering into any reasoning upon the subject, we have only to say, that the verdict in this case must be entered for the plaintiff on the count for money had and received; but as there may be cases in which the application of this practice may work injustice, we hope that the plaintiff's counsel will in future demand the premium in his opening where he means to insist upon it on failure of his claim for the loss.

Per CURIAM :

Rule absolute.

1800.
Nov. 27.

ELLIOT AND OTHERS v. DAVIS.

(2 Bos. & P. 338—339.)

[338]

A. executed a bond as the joint and several bond of himself and B., and signed it "A. and B.," having no authority from B. so to do. Held that the bond was good as the several bond of A.

DEBT on bond. Plea *non est factum*.

At the trial before Lord Eldon, Ch. J. it appeared that the bond in question was given to the plaintiffs by the defendant as surety for a third person; that previous to its execution, the defendant having brought the bond to the plaintiffs' counting-house filled up with his own name only as surety, it was objected on the part of the plaintiffs that they meant to have the joint security of the defendant and his partner, one Marsh; that upon this objection being made the bond was, with the consent of the defendant, but in the absence of Marsh, altered into a joint and several bond in the names of the defendant and Marsh, and being signed by the defendant "Davis and Marsh" was by the former regularly sealed and delivered as his deed; and that Marsh, on being informed of the transaction, expressed his disapprobation of what the defendant had done. Upon this evidence it was insisted on the part of the defendant that there was no regular single execution of the bond, there being but one seal, against which were set the names of "Davis and Marsh," and that the execution therefore being insufficient as against both, was insufficient also as against the defendant. A verdict was found for the plaintiffs, with leave to the defendant to move to have that verdict set aside and a nonsuit entered. Accord-

ingly a rule *nisi* having been obtained for that purpose on a former day,

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Cockell, Serjt. now shewed cause, and contended that the bond was well executed as against the defendant, the signing being immaterial, as appears from the form of pleading, where the sealing and delivery only are averred, both which latter acts the defendant alone performed. He cited *Cromwell v. Grunsden*, 2 Salk. 462; S. C., 1 Lord Raymond, 335, where the plaintiff, having declared on a bond of the defendant's testator Robert Erlin, and it appearing to have been signed * "Robert Erlwin" the Court on an objection taken, said, "the variance between the name signed which is Erlwin and the name in the obligation which is Erlin, is not material, because subscribing is no essential part of the deed, sealing is sufficient."

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Sellon, Serjt. in support of the rule, insisted, that though signature might not be necessary to the validity of a bond, still if any signature be actually put to it, the parties to the bond must abide by that signature; that in this case the alteration in the bond was made at the instance of the plaintiffs, who having at the time the defendant entered into this engagement refused to take his single security, ought not now to be allowed to resort to him alone, since if it had been a good joint and several bond, he would have been entitled to contribution from his co-surety.

LORD ELDON, Ch. J. :

The alteration which was made in the bond appears to have been as much the act of the defendant as of the plaintiffs, so that no argument in his favour can be drawn from that circumstance. His single security being objected to, he offered to execute a bond for himself and his partner Marsh, having no authority from the latter to bind him. The way in which this obligation begins is this, "Know all men by these presents I T. Davis and G. Marsh," &c. The defendant meant it to be his several bond, and the joint and several bond of himself and Marsh. Having had no authority to bind Marsh, the bond becomes the several bond of the defendant, but not the joint and several bond of

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himself and Marsh. The bond being sealed and delivered is sufficient, and we would, if it were necessary, hold him to have described himself by the name of "T. Davis and G. Marsh," and to be estopped from shewing that his name is T. Davis only.

The other Judges concurring in opinion :

Rule discharged.

C. P. HILARY TERM.

1801.
Jan. 27.

ASTLEY v. FRANCES WELDON.

(2 Bos. & P. 346—354.)

[346]

By articles of agreement between the plaintiff and defendant it was agreed on the part of the former that he should pay the latter so much per week to perform at his theatres, with her travelling expenses of removing from one theatre to another except extra baggage; and on the part of the defendant, that she should perform at the theatres such things as she should be required by the plaintiff, and attend at the theatre beyond the usual hours on any emergency and at rehearsals or be subject to such fines as are established at the theatres, and be at the theatre half an hour before the performances begin, and abide by the regulations of the theatres and pay all fines; and it was agreed by both parties that "either of them neglecting to perform that agreement should pay to the other 200*l*." Assumpsit upon this agreement stating several breaches, and concluding to the plaintiff's damage of 200*l*.—Held that the sum mentioned in the agreement was in the nature of a penalty, not of liquidated damages.

ASSUMPSIT. The declaration stated an agreement between the plaintiff and the defendant, whereby the plaintiff in consideration of the services of the defendant therein after mentioned, agreed to pay her during the term of three years the sum of 1*l*. 11*s*. 6*d*. per week, and to pay her travelling expenses in her removal at the usual seasons of the year from the plaintiff's theatres in London, Liverpool, and Dublin, or elsewhere, save and except her extra luggage, which was to be paid for by herself; and the defendant in consideration of such weekly salary agreed, that she would during the said term of three years, "at the usual and accustomed time or times in each day and at all other times when required by the plaintiff or his

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assigns to the best of her judgment power and ability do and perform at the respective theatres of the said plaintiff all and every such matters and things as might from time to time be required of her as a performer or otherwise by the said plaintiff or his assigns in the several public performances to be from time to time exhibited on the several stages of the respective theatres of the said plaintiff either in England Ireland or Scotland when and as often as need or occasion should be or require and when directed or requested thereto by the said plaintiff or his assigns; he the said plaintiff thereby agreeing to find fit and proper theatrical dresses for the occasion; And likewise it was thereby further covenanted and agreed on between the parties aforesaid that she the said defendant should and would during the said term thereby agreed on over and above the usual and customary hours of attendance and on any emergent *occasion attend as well as assist at either of the said theatres of the said plaintiff in forwarding the several performances as well as attend all rehearsals at the respective theatres of the said plaintiff or subject herself to the payment of the fines and forfeitures established in the respective theatres; And also that the said defendant should and would on every night's public performance at the respective theatres and before the performance attend and be there at least one half hour before such public performance should begin unless permission should be had and obtained from the said plaintiff or his assigns in writing to the contrary; And also that the said defendant should in all things conform to and duly comply with and abide by the several rules and regulations of the respective theatres in every respect in common with the several performers employed therein; and likewise pay all fine or fines that might become due and payable by means of any forfeiture or other matter cause or thing whatsoever; Provided that the plaintiff should have power to determine the agreement by notice in writing, and that if any of his theatres should be shut on particular occasions therein specified or the defendant should be prevented from attending, the plaintiff should be at liberty to deduct a proportionable part of her salary, and that if the plaintiff should be minded to shut up his theatres sooner than the usual season, for a period not exceeding a month, he should be at liberty to stop the defendant's

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salary, she being at liberty to perform elsewhere; but that if either of his theatres should remain shut for more than a month during the usual season, then the agreement should be at an end; And lastly it was thereby agreed on by and between the said parties that either of them neglecting to perform that agreement according to the tenor and effect and the true intent and meaning thereof should pay to the other of them the full sum of 200*l.* of lawful money of Great Britain to be recovered in any of his Majesty's courts of record at Westminster." The declaration then stated, that in consideration that the plaintiff had undertaken to perform all things in the said agreement on his part to be performed the defendant undertook to perform all things therein on her part to be performed, by virtue of which agreement the defendant was afterwards received into the plaintiff's service on the terms therein mentioned. It then averred, that although the plaintiff was willing that the defendant should remain in his service during the whole term and had performed every thing on his part to be performed *yet (protesting that the defendant had performed nothing on her part to be performed) the defendant did not during such part of the said term of three years as was then elapsed, at the usual and accustomed times, &c. (in the words of her agreement) perform at the plaintiff's theatres, but on the contrary thereof on &c. at &c. refused to perform such things as were exhibited on the stage of one of the theatres in the said agreement mentioned, to wit, &c. notwithstanding the plaintiff had provided proper theatrical dresses, contrary to the form and effect of the said articles of agreement and the promise and undertaking of the said defendant so by her made as aforesaid and in breach and violation thereof; And further that the defendant did not attend at the respective theatres half-an hour before the respective performances began, but on the contrary refused to attend and absented herself without leave, contrary to the form and effect &c.; And further that the defendant voluntarily withdrew herself from the service of the plaintiff for a long time during which she refused to perform at his theatres in the public performances which were legally exhibited during that period, contrary to the form and effect, &c. "By means of which said premises and by

force of the articles of agreement and the promise and undertaking of the defendant so by her made as aforesaid she became liable to pay to the plaintiff the sum of 200*l.* in the said articles mentioned," of which she had notice and was requested to pay, but refused &c. to the plaintiff's damage of 200*l.*

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Plea, *Non assumpsit*.

The cause was tried before Lord Eldon, Ch. J. at the Westminster Sittings in last Trinity Term, when the agreement having been proved, and that the defendant absented herself from the theatre, and evidence having been adduced to shew that by the regulations of the theatre the performers are subject to certain small fines for late attendance, inebriety, &c., a verdict was found for the plaintiff with 20*l.* damages; but liberty was reserved to the plaintiff to enter a verdict for 200*l.* if the Court should be of opinion that the sum of 200*l.* mentioned in the agreement was to be considered in the nature of liquidated damages.

A rule *nisi* for that purpose having been obtained accordingly,

[*Shepherd* and *Best*, Serjts. were heard in support of the rule, and *Vaughan*, Serjt. *contrà*.]

LORD ELDON, Ch. J. : †

When this cause came before me at *Nisi Prius*, I felt as I have often done before in considering the various cases on this head, much embarrassed in ascertaining the principle upon which those cases were founded: but it appeared to me that the articles in this case furnished a more satisfactory ground for determining whether the sum of money therein mentioned ought to be considered in the nature of a penalty or of liquidated damages, than most others which I had met with. What was urged in the course of the argument has ever appeared to me to be the clearest principle, viz. that where a doubt is stated whether the sum inserted be intended as a penalty or not, if a certain damage less than that sum is made payable upon the face of the

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† This judgment is minutely criticised, and subsequent authorities examined, by the MASTER OF THE

ROLLS in *Wallis v. Smith* (C. A. 1892) 21 Ch. D. 243, 259, *et seq.*, 47 L. T. 389.—R. C.

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same instrument, in case the act intended to be prohibited be done, that sum shall be construed to be a penalty. The case of *Sloman v. Walter*, 1 Brown Chan. Cas. 418, did not stand in need of this principle: for there by the very form of the instrument the sum appeared to be a penalty; in which case a court of equity could never consider it as liquidated damages, but must *direct an issue of *quantum damnificatus*. A principle has been said to have been stated in several cases, the adoption of which one cannot but lament, namely, that if the sum would be very enormous and excessive considered as liquidated damages, it shall be taken to be a penalty though agreed to be paid in the form of contract. This has been said to have been stated in *Rolfe v. Peterson* † where the tenant was restrained from stubbing up timber. But nothing can be more obvious than that a person may set an extraordinary value upon a particular piece of land, or wood on account of the amusement which it may afford him. In this country a man has a right to secure to himself a property in his amusements: and if he choose to stipulate for 5*l.* or 50*l.* additional rent upon every acre of furze broken up, or for any given sum of money upon every load of wood cut and stubbed up, I see nothing irrational in such a contract; and it appears to me extremely difficult to apply with propriety the word “excessive” to the terms in which parties choose to contract with each other. There is indeed a class of cases in which courts of equity have rescinded contracts on the ground of their being unequal. It has been held however that mere inequality is not a ground of relief; the inequality must be so gross that a man would start at the bare mention of it. Necessity in these cases seems to have obliged the Courts to admit a principle nearly as loose as that to which I have before alluded. But with respect to the case of *Ponsonby v. Adams* ‡ the landlord may have set a value upon the residence of a particular tenant on his estate; and why should he not upon that ground have stipulated that if such tenant should cease to reside there, his rent should rise to 150*l.*? Both in *Rolfe v. Peterson* and in *Ponsonby v. Adams* I should have said, that what was matter of contract bottomed on a good consideration, should not be looked upon as

penalty, but should be considered as rent reserved, or liquidated damages. In *Lowe v. Peers* † it is quite clear that the breach of promise of marriage was to be compensated for in damages: it was a contract that in case the party failed to perform his promise he should pay the sum of 1,000*l.* The case of *Fletcher v. Dyche* ‡ is very strongly to the present purpose. In that case a bond in a penal sum was conditioned, to perform certain work within a certain time, or to pay 10*l.* for every week beyond that time. The 10*l.* per week was secured by the penalty of the bond: and to have said, that one term of a contract secured by a *penal sum, should also be a penal sum, would have been absurd. Indeed Lord HARDWICKE in *Roy v. The Duke of Beaufort* § was of opinion, that a person who had entered into a bond with a penalty of 100*l.* if he poached, must have paid the 100*l.* if he had committed any act which amounted to poaching. But suppose the Duke had taken a bond in a penalty of 100*l.* with condition that the obligor should not kill a partridge, or if he did, that he should pay 5*l.* in that case it is most clear that the 5*l.* must have been considered as liquidated damages. With respect to the case of *Hardy v. Martin*,|| I do not understand why one brandy merchant who purchases the lease and good-will of a shop from another may not make it matter of agreement, that if the vendor trade in brandy within a certain distance, he shall pay 600*l.*; and why the party violating such agreement should not be bound to pay the sum agreed for, though if such agreement be entered into in the form of a bond with a penalty, it may perhaps make a difference. I must wish, that the principle laid down by Lord Somers in *Prec. in Chan.* had been adhered to. Let us then see what this case amounts to. It was contended at the trial that the last clause is not in the form of a penal bond. It is thus, “and lastly it is hereby agreed that either party failing to perform their undertaking shall pay to the other 200*l.*” *Primâ facie* this certainly is contract, and not penalty; but we must look to the whole instrument. In consideration of the defendant's services the plaintiff undertakes to pay her 1*l.* 11*s.* 6*d.* per week, and also her travelling expenses.

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† 4 Burr. 2229.

‡ 1 R. R. 414; 2 T. R. 32.

§ 2 Atk. 190.

|| 1 Brown's Ch. Cas. 419, *in notis.*

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It would be absurd to hold that, because the 1*l.* 11*s.* 6*d.* is a liquidated sum, therefore the plaintiff could not be called upon for more, and yet that in consequence of his non-payment of the defendant's travelling expenses he should be liable to the whole sum of 200*l.* because those expenses are not ascertained. Again, there are many instances of the defendant's misconduct which are made the subject of specific fines by the laws of the theatre. Are we then to hold, that if the defendant happens to offend in a case which has been so provided for by those laws she shall pay only 2*s.* 6*d.* or 5*s.* but if she offend in a case which has not been so provided for, she shall pay 200*l.*? I can find nothing in these articles which can satisfy my mind judicially, that the 200*l.* is to be paid in one case and not in the other. The clause is general and contains no exception. If that *be so, the case of *Fletcher v. Dyche* is an authority strongly in point. It therefore does appear to me that the true effect of this agreement is, to give the plaintiff his option either to proceed upon the covenants *toties quoties*, or upon the first breach to proceed at once for the 200*l.* out of which he may be satisfied for the damage actually sustained, and which may stand as a security for future breaches.

HEATH, J. ROOKE, J. and CHAMBRE, J. concurred.

Rule discharged.

1801.
Frb. 11.

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AUBERT v. MAZE.

(2 Bos. & P. 371—375.)

Money paid by one of two partners for the other on account of losses incurred by them on partnership insurances, cannot be recovered in an action brought by him against the other partner. And if this with other causes of dispute between the two be referred to an arbitrator who awards a sum due from one to the other for money so paid, the Court will set aside that part of the award.

A VERDICT in this case having been taken for the plaintiff by consent, subject to the award of an arbitrator, and the order of reference made a rule of court, the arbitrator found that the plaintiff was indebted to the defendant in 95*l.* 14*s.* 9*d.* on the balance of an account between them for the money lent, advanced,

and paid by the latter, and awarded that sum to the defendant. He then proceeded as follows: "And I also find and determine that the said plaintiff is further indebted to the said defendant in the sum of 680*l.* 2*s.* being one moiety of divers sums of money paid by the defendant for and on account of losses on policies of insurance underwritten by agreement between the said plaintiff and the said defendant at their joint risk and for their joint benefit," and accordingly awarded that sum to the defendant.

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A rule *nisi* having been obtained on a former day for setting aside this award;

Cockell and Vaughan, Serjts. now shewed cause :

The arbitrator has stated upon the face of the award the circumstances under which the 680*l.* 2*s.* has become due for the purpose of taking the opinion of the Court, whether the defendant be entitled to recover the money so paid on account of an illegal partnership. Although it be illegal for underwriters to enter into partnership,[†] yet they are liable to the insured for the amount of the sums underwritten, since it is not competent to them to set up the illegality of their own conduct by way of defence, and therefore as the defendant has only paid on behalf of the plaintiff what the plaintiff himself would have been bound to pay, the former is entitled to recover the amount as money paid to the use of the latter. In *Faikney v. Reynous*, 4 Burr. 2069, it was held that the plaintiff was entitled to recover upon a bond given to secure the repayment of money advanced by him to settle stock-jobbing differences, on the ground of the advancement of the money being collateral to the illegal concern. In *Petrie v. Hannay*, 3 Term Rep. 418, Mr. Justice BULLER observes, "there is a wide difference between partners engaged in legal and illegal contracts; in the former, if one of the partners pay the whole of a partnership debt without any express promise from *the other, the law gives him a right to recover it back in an action for money paid to the use of that other partner,

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[†] This was under the Act 6 Geo. I. c. 18, repealed by 5 Geo. IV. c. 114, s. 1, as to insurances. The case here reported remains an authority as to the general principles relating to illegal partnerships.—R. C.

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and it proceeds on this ground, that both are liable to pay : but in the case of illegal contracts, as they are not bound to pay, one of them cannot acquire a right of action against the other by paying the whole without his consent ; in such cases it is necessary to have the consent and direction of that other." Now in this case both parties being compellable to pay the money, either of them had a right to advance the whole, and to call upon the other to repay a moiety, upon the same principle that a partner in a legal partnership may do the same, namely that the payment is not voluntary. In *Watts v. Brook*, 3 Ves. 612, the Master having been directed to take an account in a partnership concern, and having included money advanced on transactions similar to the present, exceptions were taken to that account, but the LORD CHANCELLOR ordered it to stand.

Shepherd, Lens, and Bayley, Serjts. contra :

If one partner in an illegal concern, make a payment for the other at his express desire, such a payment may be considered as made for the use of the latter : but if a moiety of the money paid by one partner in the course of an illegal concern, without such express desire, may be recovered as money paid to the use of the other, the statutes prohibiting illegal partnerships are altogether nugatory. The cases of *Faikney v. Reynous* and *Petrie v. Hannay* have been considerably impeached by *Steers v. Lashley*, 6 Term Rep. 61, and *Mitchell v. Cockburne*, 2. H. Bl. 379. At any rate this case does not fall within the principle of *Faikney v. Reynous* and *Petrie v. Hannay*, of which EYRE, Ch. J. in *Mitchell v. Cockburne* observes, that they were one step removed from the illegal contract itself, and did not arise immediately out of it : and indeed his Lordship adds, that perhaps it would have been better if those cases had been decided otherwise, for when the principle of a case is doubtful he thought it better to overrule it at once than build upon it at all. The cases of *Sullivan v. Greaves*, Park, Insur. 8, and *Booth v. Hodgson*, 6 Term Rep. 405, are strong authorities to shew that money paid or received on account of partnership insurances cannot be recovered.

LORD ELDON, Ch. J. :

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This case coming before the Court on a point expressly reserved for their opinion by the arbitrator, we are not called upon to unravel the facts on which he has come to a determination either one way or the other, but to form a determination on the facts submitted to our judgment. Some of the *cases on this subject, especially that of *Petrie v. Hannay*, have proceeded on a distinction, the soundness of which I very much doubt. It has been said, that if one partner in an illegal partnership concern pay money for the other without his authority, that money cannot be recovered ; but if the money be paid with his authority it may be recovered. It seems to me, however, that if two persons engage in partnership in an illegal concern, each of them gives an authority to the other to transact all that business relating to the partnership without transacting which no profit can ever arise from the concern. In *Sullivan v. Greaves*, a third person undertook to bear half the plaintiff's risk in an insurance ; the plaintiff therefore underwrote for the joint use of both, and the agreement amounted to an implied authority to the plaintiff in case of a loss to pay the whole. Indeed if it were otherwise, the partnership must have been put an end to the moment occasion arose for the first transaction in it. The consequence therefore seems to be this, that if a partnership be legal the law raises an implied consent, and if it be illegal, yet if the payment be made in the course of the partnership business, a jury will be warranted in finding an implied consent to that payment without which the partnership could not subsist an instant. Lord KENYON does not appear to have taken any distinction between an express and an implied promise in *Sullivan v. Greaves* ; his words are “ here the plaintiff is himself the underwriter who comes to enforce an illegal contract ; it is a partnership *pro hac vice*, and this party cannot apply to a Court of Justice to enforce a contract founded in a breach of the law.” So in *Mitchel v. Cockburne*, Lord Chief Justice EYRE, speaking of this sort of partnership, says “ no contract can arise directly out of such a proceeding so as to be the foundation of an action.” His Lordship reasons on the cases of *Faikney v. Reynous* and *Petrie v. Hannay*, observing that “ they were one step removed from the illegal contract

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itself, and did not arise immediately out of it," and adds, "perhaps it would have been better if they had been decided otherwise." Indeed it seems to me that if the principle of those cases is to be supported, the Act of Parliament will be of very little use. My brother HEATH in that case agreed with the Lord Chief Justice; and I do not understand him to have said more of *Petrie v. Hannay*, than, that if right it proceeded upon a principle not applicable to the case before him: not that the principle itself was right. In *Booth v. Hodgson*, which was another case of an insurance partnership, one of the partners and a stranger acted as brokers, *and having received the premiums were sued by the other partners for their shares. Now there, it might have been insisted that the premiums being received by the consent of the other partners, the parties receiving were liable to account for them; but the Court held otherwise. In addition to this, the cases of *Steers v. Lashley* and *Brown v. Turner*, 7 Term Rep. 630, stand in opposition to *Petrie v. Hannay*, *Faikney v. Reynous*, and *Watts v. Brook*. With respect to *Petrie v. Hannay* very great weight is due to the opinion of Lord KENYON, who dissented from the rest of the Court. It is unnecessary to give a decided opinion on the determination in *Faikney v. Reynous*, since the circumstance of a specialty given to secure the money advanced, and which was there considered as amounting to a new contract, does not exist in this case. And as to the case in Chancery it may be observed, that it is possible that where parties have settled the balance of a mixed account between them of long standing, and one party has had an advantage for many years of credit being given to him for certain sums therein, a court of equity may feel itself called upon in justice to open the whole account, if the party who has already had credit for those sums think proper to object to an account being taken of the residue. But if that is to be considered as a case in which it was dryly decided that if a Master in the course of taking an account find certain sums paid on account of any of these illegal transactions, he may, on the ground of consent to such payment, view them in the same light as the other items of the account, it does not appear to me that the case proceeds upon a principle suffi-

ciently consistent with the Act of Parliament to justify the adoption of it.

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HEATH, J. :

I am of the same opinion as my Lord, who has so fully gone through the cases, that I shall only hint at them. I take it to be by no means settled that if one partner in an illegal concern pay money for the other with his consent, the money so paid can be recovered. There are great authorities and opinions both ways, and we are therefore at liberty to decide upon principles. If the concern in which the money is advanced be *malum in se*, it will not be disputed that it cannot be recovered. For if two agree to assassinate a person and hire a third to do it, and one of the two former pay the whole reward, it is clear that he cannot maintain an action for a moiety. Now I do not see any sound distinction between the case of money paid in a concern which is *malum in se* and money paid in a concern which is *malum prohibitum*. The latter as well *as the former tends to encourage a breach of the law. With respect to what was said by me in *Mitchell v. Cockburne*, though I observed that it was distinguishable from the cases in Burrow and in the Term Reports, it is not a fair inference that I meant to approve of the latter cases. Many Judges have avoided giving extrajudicial opinions, and had I given an express opinion on those cases it would have been extrajudicial.

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ROOKE, J. :

I perfectly agree with my brother HEATH in reprobating any distinction between *malum prohibitum* and *malum in se*, and consider it as pregnant with mischief. Every moral man is as much bound to obey the civil law of the land as the law of nature. With respect to this transaction, I do not mean to give any opinion how far the Court would have been called upon to set aside this award upon an affidavit stating the special circumstances, had nothing appeared upon the face of the award itself. But in this case the arbitrator has stated all the circumstances of the case especially for our opinion. Then the question is, Whether as the arbitrator has asked for our opinion,

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we are not bound by the authority of *Mitchell v. Cockburne* to say that the latter part of the award must be set aside? I think we are.

CHAMBRE, J. :

I have no doubt upon the case. The question for us to decide is not, whether we shall open transactions closed by a general award which is apparently good ; since the whole case arises on inspection of the award itself, and is therefore in the nature of a case reserved for special verdict. There is no doubt that an arbitrator is bound by the rules of law like every other Judge, and if it appear on the face of the award that the arbitrator has acted contrary to law, his award must be set aside. In this case the plaintiff wants to avail himself of an agreement entered into contrary to law, and calls upon us to enforce that agreement. To shew that it is contrary to law *Booth v. Hodgson* is a very strong authority. In that case the Court refused to assist a partner in an illegal concern in recovering money paid to his partner in the course of the concern, and which he was unconscientiously endeavouring to keep in his own pocket. The cases of *Faikney v. Reynous* and *Petrie v. Hannay* were there very much doubted. I think we cannot do otherwise in this case than decide the question submitted to us according to law, and therefore that so much of the award as is founded on this illegal partnership must be set aside.

Accordingly the Court set aside the latter part of the award.

C. P. EASTER TERM.

1801.
April 28.

THE EARL OF RADNOR v. REEVE.

(2 Bos. & P. 391—392.)

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If the judgment of statutory commissioners in certain cases be declared final by statute, their judgment cannot be questioned in an action of trespass.

TRESPASS for breaking the plaintiff's house and taking away his goods. Plea, Not guilty.

This action was brought against the defendant who was collector of the duties on male-servants, houses, windows, horses and dogs, for distraining goods in the plaintiff's house for one year's duty and surcharge on one male servant. The plaintiff had appealed against the surcharge to a meeting of the Commissioners, on the ground that the male-servant in question was a day-labourer. The Commissioners dismissed the appeal,† and the defendant in consequence made a distress upon the plaintiff's goods to satisfy the duty. When this cause came on to be tried before Lord Eldon, Ch. J. at the Westminster Sittings after last Michaelmas Term, a verdict was *found for the plaintiff subject to the opinion of this Court upon a case reserved.

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The case being now called on for argument, and the Court intimating that it was not open to discussion, inasmuch as they had no jurisdiction, the determination of the Commissioners being final;

Lens, Serjt. endeavoured to obviate that objection by citing *Milward v. Caffin*, 2 Bl. 1830, and *Harrison v. Bulcock*, 1 H. Bl. 68,‡ in the former of which cases the Court of Common Pleas had entertained a question respecting a poor-rate which had been confirmed by the Sessions on appeal, and in the latter a question on the land-tax, after an appeal to the Commissioners which had been dismissed, and observed that if the Commissioners in this case had taxed the plaintiff for a servant not falling within the description of the Act they had exceeded their jurisdiction.

But the COURT (consisting of HEATH, ROOKE, and CHAMBRE, Justices) said, that it had been determined by all the Judges of England, that when a statute provides that the judgment of Commissioners appointed thereby shall be final, their decision is conclusive, and cannot be questioned in any collateral way.

Judgment for the defendant.

† By 25 Geo. III. c. 43, s. 35, the appeal is given; and by s. 38 and 39 declared final unless a case be stated for the opinion of a Judge. By 37

Geo. III. c. 107, the duties are increased, and the former powers reserved to the Commissioners.

‡ 2 R. R. 718.

1801
April 29.

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HILL, GENT., ONE, &C., v. HALFORD AND ANOTHER.

IN ERROR.

(2 Bos. & P. 413—415.)

A note promising to pay "on the sale or produce, immediately when sold, of the White Hart, St. Alban's, Herts, and the goods, &c. value received," cannot be declared upon as a promissory note within the statute, though it be averred, that before the actions commenced the White Hart and the goods were sold.†

ERROR from a judgment of the Court of King's Bench in an action by the payee against the maker of a promissory note. The first count of the declaration stated that, "the plaintiff in error made and signed his certain note in writing, commonly called a promissory note bearing date, &c. and thereby promised to pay to the defendants in error by the names and description of, &c. the sum of 190*l.* on the sale and produce, immediately when sold, of the White Hart, St. Alban's, Herts, and the goods, &c. (meaning a certain messuage or dwelling-house called the White Hart, situate at St. Alban's, in the county of Herts, and certain goods being therein) value received, and then and there delivered the said note to the defendants in error;" after alleging the liability of the plaintiff in error to pay, and his promise as usual, the declaration averred, "that afterwards and before the exhibition of the bill of them the defendants in error, to wit, on, &c. at &c. the said messuage or dwelling-house called the White Hart, and the goods in the said note specified were sold, whereby the said sum of money *in the said note specified became and was forthwith and immediately due and payable according to the form and effect of the said note, whereof the plaintiff in error then and there had notice." There were other special counts, and also the common money counts and conclusion. On this declaration judgment having gone by default, a writ of inquiry was executed, and the defendants in error recovered general damages.

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The causes now assigned for error were, "that by the record

† The case doubtless applies to the definitions of bill of exchange and promissory note under the statute of 1882. It is cited by Chalmers under s. 3 of the Act (45 & 46 Vict. c. 61).—R. C.

aforesaid it appears, that damages have been assessed for and adjudged to the defendants in error, upon the whole of their said declaration generally; whereas it appears in and by the record aforesaid, that the first count of the said declaration was and is insufficient in law, and that no damages could or ought by law to have been assessed or adjudged to the said defendants in error in respect thereof, or of the supposed promise and undertaking therein mentioned."

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Laues for the plaintiffs in error contended, that the note on which the first count of the declaration was founded could not be sustained as a promissory note, inasmuch as the payment thereof was made to depend upon a contingency which might never happen, viz. the sale of the White Hart Inn, the title to which might be so bad, that no purchaser would be found. He cited *Dawkes v. Lord Deloraine*, 2 Bl. 782, S. C. 3 Wils. 207, and *Carlos v. Fancourt*, 5 Term Rep. 482.†

Wigley, contra :

In those cases in which it has been discussed whether a note payable upon a contingency were a promissory note within the statute, the question has principally turned upon the point whether the note in question were negociable or not; the necessity of which may perhaps be doubtful. With respect to *Carlos v. Fancourt* it appears, that in that case there were other objections to the plaintiff's recovery; for though the note was made payable "out of the defendant's money which should arise from his reversion of 43l. when sold," it was not, as in this case, averred that the reversion had been sold; and that circumstance was observed upon by Mr. Justice GROSE in his judgment. If ever there was a note depending upon a contingency, it was that which in the case of *Andrews v. Franklin*, 1 Str. 24, was held to be a good note. There the contingency was, after a certain ship should be paid off; now if it were a private ship no wages could have been earned unless the ship arrived; and if it were a public ship the wages might have been lost by desertion. In *Evans v. Underwood*, 1 Wils. 262, *a note payable upon the like contingency to

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† 2 R. R. 647.

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the former was held good : and in *Julian v. Shobbrook*, 2 Wils. 9, the defendant having accepted a bill payable when in cash for the cargo of the ship *Thetis* was held liable on the bill notwithstanding a motion in arrest of judgment on the ground of its being a conditional acceptance. Now if there be any similarity between the situation of parties to bills of exchange and promissory notes, it is between the situation of the acceptor of a bill of exchange and the maker of a promissory note. With respect to *Dawkes v. Lord Deloraine*, that was the case of a bill of exchange payable out of a particular fund, whereas the note in the present case is not payable out of a particular fund, but only at a particular time, which time is alleged in the declaration to have arrived. Supposing however, that this note is not negotiable, yet it seems from the words of 8 & 4 Ann. c. 9, s. 1, that an action may be maintained upon it, for the former part of the section enacts, that where promissory notes are made payable to any person or persons, his or their order, or unto bearer, the sums mentioned in such notes shall be payable to such person or persons, without any reference to their negotiability ; but the ensuing part of the same section only makes them assignable or indorsable over when drawn to any person or persons, his, her, or their order. If therefore negotiability be of the essence of a note, and the words of the statute are to be construed strictly, no man can declare upon a note which is not made payable to order. But it has been decided in *Burchell v. Slocock*, 2 Ld. Raym. 1545, that a promissory note payable to A. B., without adding either order or bearer, is a good note within the statute, and that case has since been recognized in *Smith v. Kendall*, 6 Term Rep. 123. In this case the note in question was drawn for value received on a promise to pay when the premises at St. Alban's should be sold, and there is an averment in the declaration that the premises have been sold.

The COURT (*absente* Lord Eldon, Ch. J.) were clearly of opinion, that the note in question could not be declared upon as a promissory note within the statute.

Judgment reversed.

ROBINSON v. DUNMORE.

(2 Bos. & P. 416—419.)

1801.

May 4.

If A. send goods by B. who says "I will warrant they shall go safe," B. is liable for any damage sustained by the goods notwithstanding A. send one of his own servants in B.'s cart to look after them.

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ASSUMPSIT. The declaration stated, that in consideration that the plaintiff, at the special instance and request of the defendant, would deliver to the defendant divers goods and chattels (specifying them) to be taken care of, and safely and securely carried and conveyed by the defendant in and by a certain cart of defendant from A. to B. and there, to wit, at B., to be safely and securely delivered to one J. S. for certain hire and reward to the *defendant in that behalf, the defendant undertook and promised to take care of the said goods and chattels, and safely and securely to carry and convey the same in and by his said cart from A. to B. and there, to wit at B. safely and securely to deliver the same to the said J. S.; that the plaintiff did afterwards deliver the said goods and chattels to the defendant, to be carried, conveyed, and delivered as aforesaid. And that although the defendant had and received the said goods and chattels, for the purpose aforesaid, yet he did not take care of the said goods and chattels, or safely and securely carry or convey the same in and by his said cart or otherwise from A. to B., nor there, to wit, at B., safely and securely deliver the same to the said J. S., but on the contrary so carelessly conducted himself in and about the carriage and conveyance of the said goods and chattels, that a great part of them, to wit, &c. through his negligence were wetted and damaged.

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The defendant pleaded *Non assumpsit*.

The cause coming on to be tried before Lord Eldon, Ch. J. at the Westminster Sittings after last Hilary Term, it appeared in evidence, that the plaintiff, who was an upholsterer, having occasion to send some furniture into the country, agreed with one Groves a carman, to take the same for ten guineas, exclusive of tolls; that Groves thinking the distance too great, offered the defendant, who also kept a cart and horse, the refusal of the job, who agreed to undertake it, and gave Groves half-a-

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guinea by way of gratuity ; that the plaintiff having acceded to the defendant's offer to go instead of Groves, the defendant brought his cart to the plaintiff's house, where the goods were loaded in the presence of the plaintiff himself, and with the assistance of two of the plaintiff's servants ; that the plaintiff having observed that the tarpaulin which the defendant had brought for the purpose of covering the cart was too small, the defendant said, " I have plenty of sacks, and I will warrant the goods shall go safe." On account of the defendant being a stranger to the plaintiff, the latter sent one of his own porters with the cart who would otherwise have gone by the stage ; that this porter in the course of the journey paid a person for watching the goods one night ; and that the goods in the course of the journey were damaged by rain. A verdict was found for the plaintiff under his Lordship's direction, with liberty for the defendant to move that the verdict might be set aside and a nonsuit entered.

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Accordingly *Williams*, Serjt. having obtained a rule *Nisi* for that purpose, was this day called upon by the Court to support the rule. It does not appear from the evidence that the defendant ever had such possession of the plaintiff's goods as to render him liable in the character of a common carrier. On the contrary it is clear from the plaintiff having sent his porter to accompany the cart, that he never intended to relinquish his control over the goods ; and the circumstances of the loading having been made at his house and under his inspection, and of the porter having paid for watching them during the journey, strongly corroborate that idea. In this case there was no bailment : the defendant could neither have maintained trespass or trover. It was a mere contract between the plaintiff and defendant, that the former should hire and the latter should let a cart and horse for the conveyance of the plaintiff's goods. The case strongly resembles that of *The East India Company v. Pullen*, 1 Str. 690, where the company having brought an action against a lighterman, it appeared, that as soon as the goods were put into the lighter, an officer of the company went on board, and put the company's locks on the hatches : and

LORD RAYMOND, Ch. J. held that the goods were not to be considered as ever having been in the possession of the lighter-man, but in the possession of the company's servant who had hired the lighter to use himself. There are many cases in which persons having a much greater control over goods than the defendant had, are yet not considered as having the possession : such are the cases of a butler who hath the charge of his master's plate, and the shepherd who hath the charge of his master's sheep, 1 H. P. C. 506, c. 43. It is true that in the present case the defendant made use of the expression, that he would warrant that the goods should go safe. But under all the circumstances, it may be argued, that it was not his intention by that expression to do any thing more than enforce his own opinion. Admitting however, that the jury have decided that point against the defendant, yet no advantage can be taken of the warranty in the present action, since the averment that the goods were delivered to the defendant has not been substantially proved.

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HEATH, J. (stopping *Vaughan*, Serjt. for the plaintiff) :

The defendant in this case is not charged as a common carrier : he is charged on a special undertaking; and the jury have found on good grounds that the undertaking stated in the declaration was made by the defendant. They have decided *upon considering the whole transaction, that the words used by the defendant amounted to a warranty; and we cannot say that they have done wrong. It is quite immaterial to this case whether the defendant had a special property, or any property whatever in the goods; or whether he could have maintained an action of trespass or trover. He must have had possession of them for the purpose of carrying his contract into effect, which he could not have done without such possession.

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ROOKE, J. :

This is not the case of a common carrier, for the defendant has specially undertaken to carry the goods safely.

CHAMBRE, J. :

This is a very clear case. The defendant is not a common

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carrier by trade, but has put himself into the situation of a common carrier by his particular warranty. As to possession, that seems clearly proved by the circumstances of the case; the defendant attends with his horse and cart at the plaintiff's house, where the goods are delivered to him and put into the cart by the plaintiff's servants. This is a complete possession. How is this affected by the presence of the plaintiff's servant? It has been determined, that if a man travel in a stage coach and take his portmanteau with him, though he has his eye upon the portmanteau yet the carrier is not absolved from his responsibility, but will be liable if the portmanteau be lost.† In this case the plaintiff for greater caution sends his servant with the goods, who pays for watching them because he apprehends danger of their being stolen. So the man who travels in a stage has some care of his own property since it is more for his interest that the property should not be lost than that he should have an action against the carrier. This case bears no resemblance to that cited from *Strange*,‡ for there the decision proceeded on the usage of the East India Company, who never intrust the lightermen with their goods, but give the whole charge of the property to one of their own officers who is called a guardian. The evidence of the warranty is perfectly clear, for on the plaintiff's making some objection to the smallness of the tarpaulin, the defendant, in order to remove that difficulty, informed him that he had plenty of sacks to cover the goods, and undertook that they should be carried safe. It appears to me, that the verdict is perfectly right, and that the jury could not have done otherwise than they have done.

Postea to the plaintiff.

† This *dictum* is cited, and its applicability to the case of a railway passenger having his portmanteau in the carriage with him, discussed in the judgment of WILLES, J. in *Talley v. G. W. Ry. Co.* (1870) L. R. 6 C. P. 44, 50, 40 L. J. C. P. 9. A similar

question was brought up for the decision of the House of Lords in *G. W. Ry. Co. v. Bunch* (1887) 13 App. Ca. 31, where the cases bearing on the subject are fully discussed.—R. C.

‡ *East India Co. v. Pullen*, 1 Str. 690.

HURRY AND OTHERS v. THE ROYAL EXCHANGE ASSURANCE COMPANY.†

(2 Bos. & P. 430—437.)

1801.
May 11.

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Insurance on goods from A. to B. "until they should be there discharged and safely landed;" on their arrival at B. the merchant to whom the goods belonged, employed and paid a public lighter to land them, and the goods being damaged in the lighter without negligence, the underwriters were held liable for the loss.

THIS was an action on a policy of assurance on ship and goods from Petersburg to London, including the risk of boats to Cronstadt beginning the adventure on the said goods and merchandizes from and immediately following the loading thereof on board the said boats at Petersburg, and on the ship at Cronstadt; to continue upon the ship until she should be arrived at London, and had there moored at anchor twenty-four hours in good safety, and upon the goods and merchandizes until they should be there discharged and safely landed.

The cause was tried before Lord Eldon, Ch. J. at the Guildhall Sittings after last Hilary Term, when it appeared that the ship and cargo (consisting of hemp) arrived in safety in the river Thames; that the plaintiffs being the consignees of the goods, by their broker employed and paid a lighterman belonging to one of the public lighters entered at Waterman's Hall to land the hemp; that the hemp was damaged on board the lighter, but without any negligence imputable to the lighterman; that it is the constant practice for merchants in the Russian trade to land their goods by means of lighters, and that there are no other lighters now in use among the merchants but the public lighters. A verdict was found for *the plaintiffs with liberty to the defendants to move to have a nonsuit entered on the ground of the insurance being discharged by the delivery of the hemp to the lighters employed and paid by the consignees of the cargo.

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Accordingly a rule *nisi* having been obtained on a former day,

† Cited, with other cases showing that "the policy in ordinary cases attaches until the goods are landed," by BYLES, J. in *Lane v. Nixon* (1866) L. R. 1 C. P. 412, 420.—R. C.

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Shepherd, Heywood, and Bayley, Serjts. now shewed cause :

The question is, Whether the damage which the goods sustained on board the lighter be one of the risks insured against by this policy? It must be admitted that if the loss had happened on board one of the ship's boats the underwriters would have been liable; it is not therefore necessary that the loss should happen on board the ship itself, but it is sufficient if it happen in the ordinary course of conveying the goods on shore. In the case of *Pelly v. The Royal Exchange Assurance Company*, 1 Bur. 341, the goods having been placed in a warehouse built on a sand-bank in the river of Canton in China, while the ship was repairing, were destroyed by fire; yet as that unloading of the goods appeared to have been in the ordinary course of the voyage, the Court held the underwriters liable; and Lord MANSFIELD there cited a case of *Tierney v. Etherington*, before LEE, Ch. J., where it was ruled that a loss happening on board a store-ship at Gibraltar was covered by a policy containing an agreement, that upon the arrival of the ship at Gibraltar the goods might be unloaded and re-shipped in one or more British ship or ships for England or Holland. The expressions of LEE, Ch. J. were "the construction shall be according to the course of trade in this place, and this appears to be the usual mode of unloading and re-shipping in this place, viz. that when there is no British ship there, then the goods are kept in store ships." Indeed the Court will attach that meaning to the words "safely landed," which the course of trade puts upon them; and Lord MANSFIELD in 1 Bur. 348, says, "when goods are insured till landed without express words, the insurance extends to the boat, the usual method of landing goods out of a ship upon the shore." It is true that the case of *Sparrow v. Carruthers*, 2 Str. 1236, seems to be an authority in the defendant's favour, since it was there holden that the owner of the goods by landing them in his lighter discharged the underwriters. But with respect to that case it may be observed that it was only a *Nisi Prius* decision, that the doctrine of LEE, Ch. J. in *Tierney v. Etherington* is inconsistent *with that laid down by him in *Sparrow v. Carruthers*, that it is contradicted by a case of *Langloie v. Brant*, before Willes,

Ch. J. and that even supposing it to be good law, still it is not an authority in the present case, since as the lighter there belonged to the owner of the goods he might be considered as having taken them into his own custody, whereas the lighter in the present case was a public lighter employed in the usual course of trade. This distinction is expressly recognized by BULLER, J. in the case of *Rucker v. The London Assurance Company*.†

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† *Rucker v. London Assurance Company*. At Guildhall, Tuesday, 8th June, 1784. Coram Buller, J.

This was an action on a policy of insurance on the *Eliza-Sophia*, at and from Grenada to London, on the ship until moored twenty-four hours, and on goods until safely discharged and landed, and the declaration stated, that before the goods, viz. hogsheads of sugar, were safely discharged and landed, they by the perils of the river Thames and the waters thereof were washed away and lost.

The several wharfs between London Bridge and the Tower are called Free Quays, at which only foreign produce liable to pay duties can be landed. The owners of most of these quays entered into a partnership, which was to expire at Lady-day then next; and not only did the business of wharfingers, but of lightermen, employing their own lighters in discharging such vessels as were to land goods at their wharfs. The owners of some of the wharfs, not of the company, have also their own lighters, while the owners of others are not possessed of lighters of their own, but employ public lightermen. When a ship arrives in the river, the first thing that is done is to quay the ship. When a ship is quayed at a wharf belonging to one of the company, the company provides lighters and does all that is necessary for landing: when at a

wharf not belonging to any of the company, the owners provide lighters, &c. All the wharfs do not keep lighters or employ the company, but employ persons having lighters but no wharf, as Drinkall, the person who was employed here by the plaintiffs. It is not usual for merchants to employ lightermen, they usually leave it to the wharfinger, but Hibbert's house (and that only) generally employs one lighterman.

The plaintiff applied to the agent for the company of wharfingers to land the sugars in question, but they not being able to undertake the business, and the plaintiff fearing the ship might be kept on demurrage, one Drinkall, who followed the business of a lighterman, was applied to by him with consent of the company. Drinkall's usual business was to work out rums, and he has been often employed by the company, and on this occasion was, when applied to, employed by them in working out the ship *Experiment*, but as a favour he left her, to work out the sugars. Drinkall was a public lighterman for hire, and his lighter was numbered at Waterman's Hall, without which no lighter could be allowed to work. On the 30th September, fifty-seven hogsheads of sugar were put on board his lighter, and there were two men on board (which are the usual number for a lighter), and the second mate of the ship; as she was proceeding to the shore, she struck upon the anchor

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Leas and Best, Serjts. in support of the rule.

The principle of law laid down in *Sparrow v. Carruthers* must now prevail. It seems to be settled that if the goods are received

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of a ship, and sunk through an unavoidable accident, without any imputation of neglect in any body on board. The sugars were of course much damaged, and this action was brought to recover an average loss of — per cent.

Bearcroft for the defendants contended, that strictly speaking, the policy extended till the goods were landed by the ship's boats, but that the custom of trade had for convenience substituted something else, viz. lighters. The custom here had not been complied with: for there was an important difference in the merchant taking upon himself to employ lightermen; this was not the course of trade, and the defendants were thereby completely discharged from the subsequent loss. A merchant may give up the custom, and the plaintiff has done it here. In the common course of trade he could not have got discharged under a week. "Then," says he, "I dismiss every advantage from the custom, I discharge the underwriters for my own reasons and for my own benefit." The freight is due (and it is only due when the voyage is ended) when the goods are delivered to his lighter. If the plaintiff's own lighter had been sent, it would not have been in the course of trade, and this is in effect the same thing.

BULLER, J. told the jury that the decision of this cause depended on the usage, but the fact of the usage once established, the question, whether the underwriter is liable or not was matter of law. But it belonged to the jury to say whether what had been done here was or was

not in the usual course of trade. There is no distinction between a public and private wharf, for a ship may go to either, and underwriters are equally liable at both. If she goes to a private wharf the public lightermen are not employed, so that there are cases in which the underwriters would be liable when the company is not employed. It is merely a voluntary society, and these lighters are not on a different footing in any respect from the rest of the lighters. If then that is not the line, what is? The line is between lighters which are public, and lighters which are the property of the merchants, and work only for them. The public lighters have a stamp of authenticity, they are entered at Waterman's Hall, as Drinkall's was, and have a public credit. The case in *Strange (Sparrow v. Carruthers)* does not interfere. If a merchant will not send public lighters entered at Waterman's Hall, it shall be a delivery to the merchant when the goods are put on board his lighter; but not if he sends lightermen appointed by the Waterman's Company, and who are public officers. In the case in *Strange* the lighter is said to be the property of the plaintiffs, and one expression of the Chief Justice is, that it would have been otherwise had the goods been sent by the ship's boat, i.e. the lighter of the ship employed to discharge her, for it could not be the ship's boat, literally speaking, because it would be impossible it could discharge a whole cargo.

If the jury were of this opinion, he directed them to find for the plaintiff.

Verdict for the plaintiff.

out of the ship in private lighters the underwriters are discharged. Now the only ground upon which this position can be supported is, that the possession of the goods has been altered, and the owner has taken them into his own custody. If this be the principle, it can make no difference whether the lighter be public or private: for the person who hires a public lighter for the conveyance of his own goods, makes that lighter as much his own *pro hac vice* as a private lighter, and the goods while *on board are completely in his own custody. This case therefore does not depend upon the question whether the goods have been taken out of the usual course of the voyage, but whether the plaintiff has not received them into his own custody before they were actually landed, and thereby discharged the underwriters from the remainder of the risk. Undoubtedly if the lighter employed in this case had been employed by the ship owner, the delivery of the goods would not have been complete until they were safely landed: but if the merchant find it inconvenient to wait for the delivery of the goods by the ship owner, but chooses to receive them into a lighter, whether public or private, he by that act puts an end to the voyage. Neither in *Pelly v. The Royal Exchange Assurance Company*, nor in *Tierney v. Etherington*, could it be said that the goods had been delivered into the possession of the owners, since the loss in both cases happened in the middle of the voyage. With respect to the opinion of Mr. J. BULLER in *Rucker v. The London Assurance Company*, it is to be observed that the learned Judge lays great

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Mr. J. BULLER, before the opening of plaintiff's case was finished, asked if the point in the cause had not been decided several times since he attended Guildhall?

Bearcroft, for the defendants, mentioned *Sparrow* and *Carruthers* as in point.

BULLER, J.:

This has been determined some way or other, and I think differently in two cases. If the lighter does not belong to a public company, but

to the master of the goods himself, the underwriters are not liable, but if the lighterman is a public officer, they are liable.

Lee, for the plaintiff, cited from his own notes the case of *Langlois* and *Brant* before Lord Ch. J. WILLES, which was a much stronger case than *Sparrow v. Carruthers*. The policy was from Jamaica to — and till landed. The consignee sent his own lighter, and negligence was proved, and a special jury found against the underwriters.

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stress on the circumstance of the lighter having been entered at Waterman's Hall, and considers the lighterman as a public officer, whereas that circumstance gives no publicity of character to the lighter, but only makes the owner (who is no more a public officer than a hackney coachman) amenable to the regulations of the company for misconduct in the river. As to the note which has been referred to of *Langlois v. Brant*, it is not entitled to any credit, since it is there said that negligence was proved, and yet that the underwriters were held liable.

HEATH, J. :

The question in this case is, whether the goods insured have been safely landed within the true intent and meaning of those words in the policy, for to every part of the policy we must give complete effect. Now if we were to hold that the insurers were discharged by the delivery of the goods to the lighter, we should defeat the words "safely landed," and render them altogether nugatory. It is admitted that the business of unloading the Russian ships is carried on by public lighters, and that no private lighters are ever employed by the merchants. Now if that be so, what effect is to be given to the words "until the goods are safely landed," if they do not extend to the goods when on board the public lighter, for in no other manner can they be safely landed. It is true that the *master and owners of the ship were discharged when the goods were put on board the lighter; but freight and insurances are not commensurate; the latter is far more extensive than the former. The insurance commences before the freight, for it commences when the goods are put on board the boats at Petersburg, and it also continues longer than the freight, for it does not determine until the goods are safely landed. There is no pretence for saying, that if the freighter of the goods had made use of his own boats in putting the goods on board at Cronstadt the insurers would have been thereby discharged. It has been argued, however, that whenever the custody of the goods is changed, the insurance is at an end: but that argument is founded on the notion of freight and insurance being co-extensive. With respect to the case of *Sparrow v. Carruthers*, I think it ought not to be extended; it

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was only a *Nisi Prius* decision ; it has been cited several times, but never recognised, and whenever it has been cited great pains have been taken to distinguish it from the cases before the Court, though perhaps not always with success. I do not mean however to quarrel with that decision ; a case precisely similar is not likely to arise again, since it is not customary for the owners of goods to send their own lighters, but always to employ public lighters.

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ROOKE, J. :

I am of the same opinion. The words of this policy are, that the underwriters shall continue liable until the goods are safely landed ; now I think it is going too far to say, that when the goods are put on board the lighter they are safely landed. I cannot agree that this case depends on the question, who employs the lighter ? It appears to me to depend upon the question, what the lighter is ? For whether the lighter be employed by the owner of the goods or the owner of the ship, the landing of the goods is equally dangerous, and the risk of the underwriters the same. The criterion seems to be, whether it is a public lighter, publicly registered, and in short, that sort of lighter which is equally known to the underwriters and the owner of the goods. It is certainly much for the benefit of the underwriters that this construction should prevail : since it is desirable for him that the merchant should as much as possible facilitate the landing of the goods ; for the sooner they are landed, the sooner the risk of the underwriters determines. If the body of underwriters were bound to elect whether these *large Russian ships should be unloaded by means of these lighters employed by the persons interested in the goods on board, or whether the unloading should be left to the sole management of a foreign captain, who probably knows very little about the nature of public or private lighters, and who must necessarily be much longer about it, I think they would not hesitate to choose the former method as most safe. With respect to the case of *Sparrow v. Carruthers*, Mr. Justice BULLER has expressly taken the distinction between public and private lighters, which differs that case from the present.

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CHAMBRE, J.:

This is a case of considerable consequence in respect of the sum which depends upon it, but of still more in respect of the general question which it involves; and if I entertained any doubts upon the subject, I should wish to take time before I delivered an opinion; but having none, I think the sooner we come to a decision the better. The argument for the underwriters rests entirely on the case of *Sparrow v. Carruthers*. I do not wish to shake the authority of that case, nor indeed is it necessary so to do; but I cannot but observe that if the decision had been otherwise I should have been better satisfied. The case before Mr. Justice BULLER has more weight with me: and particularly so, because the parties acquiesced in his determination, notwithstanding they would have been armed with the authority of *Sparrow v. Carruthers* had they been inclined to bring the case before the Court. The only strong ground upon which the case of *Sparrow v. Carruthers* can be supported (if indeed it can be supported at all) is, that the owner of the goods completely accepted them, and discharged the ship owner from any further concern in them. In this case I rely on the words of the policy and the known and settled usage of trade. What can the words "until safely landed" refer to? It is admitted that it is impossible for these large vessels to come up to the wharfs in order to deliver their goods; that the merchants have no lighters of their own, and that the ships' boats are inadequate to the purpose. In all cases, therefore, the goods must be delivered by the public lighters, and we must take the underwriters to be cognizant of the usage of the trade which they insure. I do not lay much stress on the notion of these lighter-men being public officers: there are many trades which are under certain regulations, such as porters, carmen, and hackney coachmen, and yet they are not public officers; *but I rely on the constant usage of trade, and on the words of the policy.

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Per CURIAM:

Postea to the plaintiffs.

STEEL *v.* ALLAN.

(2 Bos. & P. 437.)

1801.
May 12.

[437]

The Court will not compel security for costs in error on the ground of the plaintiff in error being a lunatic.*

THIS was a rule calling on the defendant or his attorney to shew cause why security should not be given by one of them for the costs of a writ of error on the judgment in this cause, otherwise the plaintiff to be at liberty to proceed in the action and on the recognizance of bail, notwithstanding the allowance of the writ of error. To obtain this rule an affidavit had been produced, stating all the proceedings in the action, and alleging the belief of the plaintiff's attornies, that there was no cause of error, the defendant's attornies having agreed not to assign the want of an original as cause of error, and deposing that since the commencement of the action a commission in the nature of a writ *de lunatico inquirendo* had issued, under which the defendant had been found a lunatic and a committee had been appointed.

Cockell, Serjt. now shewed cause on the ground of this application being perfectly new in practice, and not supported by any principle.

Clayton, Serjt. in support of the rule argued, that the estate of the lunatic would not be liable, being under the control of the Crown, and therefore the plaintiff would be harassed without any prospect of being repaid the costs of the writ of error to which the recognizance of bail does not extend.†

But the Court refused to accede to the application.

Rule discharged.

† By this must be meant the recognizance of bail in the Court below, for if it had been a case in which bail in error could have been taken, it would have been otherwise.

1801.
May 13.

BROMLEY v. COXWELL.

(2 Bos. & P. 438—440.)

[438]

A. entrusted B. with goods to sell in India, agreeing to take back from B. what he should not be able to sell, and allowing him what he should obtain beyond a certain price, with liberty to sell them for what he could get if he could not obtain that price; B. not being able to sell the goods in India himself, left them with an agent to be disposed of by him, directing the agent to remit the money to himself in England. Held that A. could not maintain trover against B. for the goods.†

TROVER for some prints. The cause was tried before Lord Eldon, Ch. J. at the Westminster Sittings after last Hilary Term, when the following facts appeared in evidence :

The plaintiff being a printseller, and the defendant a mate of an East Indiaman, in February, 1799, the latter was entrusted by the former with some prints to be disposed of in India under the following agreement. “ William Bromley agrees to send out by James Coxwell one hundred engravings from his plate of His Majesty on horseback under these conditions, that provided James Coxwell can dispose of any one or all of them at above one guinea each, he the said James Coxwell is to be accountable to William Bromley on his return to England, for as many as he may dispose of at one guinea each; and William Bromley agrees to take all or as many as may be returned by the said James Coxwell, provided he the said James Coxwell cannot sell them in India or at any other port he may touch at, without expecting any sum from James Coxwell, or making any charge; and William Bromley further agrees to and authorizes James Coxwell to sell them for whatever they may fetch, if not more than one guinea may be offered for them separately. The defendant on his arrival at Calcutta not being able to obtain more than three shillings and five pence per print, at which sum he sold one only, carried the remainder to Madras, and there endeavoured to sell them, but with no better success, whereupon, judging for the best, he left the residue in the hands of an agent at Madras to be disposed of by him, directing the agent to remit the money to

† Compare however the statement of the general principle as to delegation of agency, by Lord ELLEN-

BOROUGH in *Cockran v. Irlam*, 2 M. & S. 301.—R.C.

him in England, at the Jerusalem Coffee-house, London. On his arrival in England, he said to a third person, "I have taken upon myself to leave the prints in India, and I hope Mr. Bromley will approve of what I have done."

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v.
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The jury found a verdict for the plaintiff, subject to the opinion of the Court, whether under the above circumstances trover could be maintained?

A rule having been obtained for setting aside the verdict, *Best* and *Onslow*, Serjts. now shewed cause and contended, that it was a general principle of law, that wherever a person takes upon himself to dispose of the goods of another without an authority so *to do, it amounts to a conversion; and that the words "to his own use," though necessary to be inserted in averring the conversion, have always received a liberal construction; that it made no difference that the goods in this case were originally bailed to the defendant, for that the defendant, by disposing of them in a manner unauthorized by the agreement, had determined the bailment, and become guilty of a conversion. They cited *Wilson v. Chambers*, Cro. Car. 262, where the Court said, "denying to deliver upon request is a conversion;" and *Waldgrave v. Ogden*, 1 Leon. 224, S. C. Cro. Eliz. 219, where *WALMESLEY, J.* said, "If a man find my garments and suffereth them to be eaten with moths by the negligent keeping of them, no action lieth; but if he weareth my garments it is otherwise, for the wearing is a conversion." They urged that the plaintiff was clearly entitled to some action; that had the injury arisen from a mere non-feasance on the part of the defendant, the proper remedy would have been an action on the case, but that the positive act of the defendant in delivering the prints to his agent in India without any authority so to do was sufficient to support an action of trover. *Anon.* 2 Salk. 655, *Syeds v. Hay*, 4 Term Rep. 260,† where *BULLER, J.* said, "If one man who is entrusted with the goods of another put them into the hands of a third person contrary to orders, it is a conversion;" and *Youl v. Hardbottle*, 1 Peake's N. P. Cas. 68, where Lord *KENYON* said, "I agree that when a carrier loses goods by

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† 2 R. R. 378.

BROMLEY v. COXWELL. accident, trover will not lie against him, but when he delivers them to a third person and is an actor, though under a mistake, this species of action may be maintained."

Shepherd, Serjt. *contrà*, was stopped by the Court.

HEATH, J. :

I am not clear that in the present case there was any breach of the agreement. The defendant does not agree to bring the prints home; he was authorized to sell them for what they might fetch, if not more than one guinea should be offered for them separately: and under this part of the agreement I do not see why he was not at liberty to leave them with an agent to be sold. The conduct of the defendant, however, cannot amount to a conversion in any point of view. It is agreed that mere negligence is not sufficient; now the conduct of the defendant in not selling the prints in India was a mere non-feasance. To support an action of trover there must be a positive tortious act.

ROOKE, J. :

[440] In this case there was no agreement to bring the prints home. The defendant left them in India judging for the best; and though he ordered the money to be remitted to himself, it is clear that this was done with no other view than to facilitate the payment of it to the plaintiff. At all events it does not appear to me that there was any conversion.

CHAMBRE, J. :

It is not necessary to decide whether any action at all could be maintained under the circumstances of this case; but the strong inclination of my opinion is, that none could be maintained. The plaintiff agrees to send some prints to India, and if they are sold for more than one guinea each, the defendant is only to account for them at that sum. Then the plaintiff agrees to take all which shall be returned without any charge to the defendant: none are returned. The agreement concludes with a general authority, in case the prints do not sell for a guinea each, to sell them for whatever they may fetch. The defendant not being able to sell them at a guinea, leaves them with an

agent to be sold to the best advantage. It does not appear that any have been sold. No act has been done. The agreement does not express the defendant shall sell the goods himself; it seems therefore that the delivery to his agent was within the terms of the agreement.

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Per CURIAM :

Rule absolute for entering a nonsuit.

C. P. TRINITY TERM.

PARRY v. FRAME.

(2 Bos. & P. 451—452.)

1801.
June 8.

[451]

A. having agreed to purchase of B. the remainder of a term, the latter delivered to him the lease, in order that he might get an assignment made out; A. then obtained an enlargement of the term from the original landlord, and refused to accept an assignment or pay the full price agreed on, because B.'s under-tenant had removed some fixtures. Held that B. might insist on A. accepting the assignment, and after demand and refusal of the lease might maintain trover for it.

TROVER for an indenture of lease.

The defendant having agreed to purchase of the plaintiff for 75l. the remainder of a term of twenty years in a house, whereof eight years were unexpired, the latter delivered up to him the indenture of lease for the purpose of enabling him to get an assignment made out, and also the key of the house. After this the defendant having made a bargain with the original landlord for an enlargement of the term, and having some dispute with the plaintiff respecting certain fixtures which the plaintiff's under-tenant had taken off the premises, refused to pay the full price agreed upon, claiming to make a deduction for the articles taken away; and also declined to accept an assignment of the term from the plaintiff, alleging that it was rendered unnecessary by his subsequent bargain with the original landlord. Upon this the plaintiff required that the lease should be returned, which was refused: but no demand was ever made of the purchase-money. It appearing at the trial *before Chambre, J. at the Sittings after last Easter Term, that the defendant at the

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v.
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time of the agreement being entered into with the plaintiff was aware that the under-tenant was to take away the fixtures in dispute, but that the plaintiff had also taken away some articles to which he had no right; the jury deducted the amount of the latter articles from the price agreed upon, and found a verdict for 79*l.* 19*s.*

Clayton, Serjt. now moved for a rule, calling on the plaintiff to shew cause why a nonsuit should not be entered, contending, that under the circumstances of this case trover was not maintainable, for that the defendant had an interest in the lease, and a lien upon it; that although a legal assignment of the lease had not actually been made, yet that a court of equity would have enforced the defendant's title to it by compelling a specific performance of the agreement between the parties; that the defendant therefore having an equitable title to the lease, could not be guilty of a conversion by retaining it; and that the two circumstances which are necessary to support an action of trover did not concur in this plaintiff, namely, the right of property and the right of possession. He cited *Gordon v. Harper*, 7 Term Rep. 9.†

But the Court was of opinion, that although the defendant on payment of the purchase money and taking an assignment would be entitled to retain possession of the indenture of lease, yet that the plaintiff had a right to insist upon an assignment being made out with covenants to protect himself, and that therefore, as the defendant had refused to accept an assignment or return the lease, the action of trover was maintainable.

Clayton took nothing by his motion.

† 4 R. R. 369.

MILLS AND OTHERS v. BALL.

(2 Bos. & P. 457—464.)

1801.
June 12.

[457]

A. living at N. in Devonshire, ordered goods of B. in London, who sent them by ship, *vid* Exeter, consigned to A. and advised him thereof. On their arrival at Exeter they were delivered to C. a wharfinger who received them on A.'s account, and paid the freight and charges; after their arrival A. wrote to B. informing him that in consequence of his affairs being deranged he should not take the goods, and telling him that they were at Exeter; at this time A. had committed an act of bankruptcy, upon which he was afterwards declared a bankrupt. B. applied to C. for the goods, and tendered him the freight and charges due; upon which C. promised not to deliver them out of his custody, but afterwards did deliver them to the assignees of A. though indemnified by B. Held 1st, that B. had a right to stop the goods in the hands of C.; and 2ndly, that he might maintain trover for them against C.†

THIS was an action of trover for one cask of madder and one chest of indigo; to which the defendant pleaded the general issue. The cause came on to be tried before Lord Eldon, Ch. J. at the Sittings at Guildhall after last Hilary Term, when a verdict was entered for the plaintiffs with 111*l.* 7*s.* 3*d.* damages, and 40*s.* costs, subject to the opinion of this Court upon the following case: Josias Gard a trader of North Tawton, in the county of Devon, about twenty-five miles from Exeter, on the 4th of July, 1799, by letter to the plaintiffs, who were dry-salters in London, ordered the goods which were the subject of this action to be sent to him. The plaintiffs accordingly on the 6th of July, 1799, sent the goods which were of the value of 111*l.* 7*s.* 3*d.* by the ship *Lively*, consigned to Gard, and sent a letter of advice to him inclosing the invoice, dated the 6th of July, 1799, which letter Gard received in course; and the goods on their arrival at Exeter were delivered to the defendant, who was a wharfinger there, and received them on Gard's account, and paid the freight and charges with which he debited Gard, and if any accident had happened to the goods before the receipt of the following letter, the plaintiffs would have called on Gard for payment. On the 16th September, 1799, soon after their

† And see *Openheim v. Russell*, 3 284; *Bohtlinck v. Inglis*, 3 East, 381, B. & P. 42; *Goss v. Smith*, 1 Campb. 389.

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arrival, Gard wrote the following letter to the plaintiffs Messrs. Smith, Mills, Berkett, and Co. "Northtawton, 16th September, 1799. Sirs,—As some disagreeable matters have recently taken place in my concerns, I have thought proper to leave the madder and East India indigo which I lately gave you an order for on your account. It is arrived safe at Exeter, so you will please to sell the same to any of your correspondents there, as I would wish to do by you as I would wish to have done by myself. I am very truly, Sirs, your obedient servant, JOSIAS GARD. The goods are at the wharfinger's office, marked *Lively*, R. Mather." In consequence of this letter the plaintiffs wrote to their agent at Exeter to stop the goods in possession of the defendant, and on the 20th of September the plaintiffs' agent went to the defendant, in whose warehouse the goods then were, and tendered him *his freight and charges and demanded the goods on the behalf of the plaintiffs. The defendant said (as the fact was) that some of Gard's creditors had been there before to demand them, but he had refused to deliver them, hearing that Gard had stopped payment. He then promised not to deliver them out of his custody till he was certain of a safe delivery. On the 2nd of October the demand was repeated by the plaintiffs' agent and a bond of indemnity left with the defendant to indemnify him against any claim that might be made from any other person. On the 23rd of September a commission of bankrupt issued against Gard, who was subject to the bankrupt laws, indebted to the petitioning creditors in a sum sufficient to support the commission, and had committed an act of bankruptcy on the 8th of September, 1799. On the 1st of October, 1799, he was duly declared a bankrupt, and on the 19th of October, 1799, assignees of his effects and estate were duly chosen, and an assignment executed. On the 3rd of November the defendant delivered the goods to the assignees, who sold them for 103*l.* 7*s.*; the charges amounted to 3*l.* 19*s.* The questions for the opinion of the Court were, whether the plaintiffs were entitled to recover? and if they were, what damages? whether 111*l.* 7*s.* 3*d.* or 103*l.* 7*s.*, or 99*l.* 17*s.*? If the Court should be of opinion with the plaintiffs, the verdict to stand for such sum as they should direct; if for the defendant a nonsuit to be entered.

Best, Serjt. for the plaintiffs.

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The question is, whether the plaintiffs under the circumstances of this case were entitled to stop the goods *in transitu*? The general rule is, that where the vendee becomes insolvent the vendor has a right to stop the goods at any time before they come into the actual possession of the vendee. In *Lickbarrow v. Mason*, 2 Term Rep. 71, Mr. Justice Ashurst says, "where the delivery is to be at a distant place, as between the vendor and vendee, the contract is ambulatory till delivery, and therefore in case of the insolvency of the vendee in the mean time, the vendor may stop the goods *in transitu*." Now at the time when these goods were demanded by the plaintiffs, they had not arrived at their journey's end; for they had only reached Exeter, and were to be carried on from thence, and delivered to the vendee at North Tawton. The case of *Hodgson v. Loy*, 7 Term Rep. 440,† is a decided authority in the plaintiffs' favour. Indeed that case is much stronger than the present, since the initials of the vendee had been marked upon the articles in dispute previous to *the stoppage *in transitu*, and they were delivered to a carrier nominated by the vendee: neither of which circumstances occurs in this case. So in the case of *Stokes v. La Riviere*, cited 3 Term Rep. 466,‡ and 7 Term Rep. 443,§ the goods were sent by the particular conveyance appointed by the consignee: and in *Hunter v. Beal*, cited 3 Term Rep. 466, the goods in question were sent to the defendant, who was an innkeeper, directed to the consignees, and while in his hands he received directions from the consignees to ship them, and was only prevented from so doing because he arrived too late at the quay with the goods; yet in both these cases the consignees were held entitled to stop the goods *in transitu*. And in *Hunt v. Ward*, cited 3 Term Rep. 467, where goods were sent by order of the vendor to a packer, the packer was considered as a middle man, and the vendor was held to have a right to stop the goods. If the Court should be of opinion that the plaintiffs are entitled to succeed, the only remaining question will be, what damages the plaintiff shall recover? Whether 111*l.* 7*s.* 3*d.* the value of the goods, 103*l.* 7*s.* the sum

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† 4 R. R. 483.

‡ 1 R. R. 744.

§ 4 R. R. 486.

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for which they were sold, or 99*l.* 17*s.* the sum for which they sold after deducting the charges?

Here the COURT expressed themselves clearly of opinion that the plaintiffs were only entitled to the smaller sum.

Shepherd, Serjt. *contra*.

The letter of the 16th of September, 1799, being written to the plaintiffs by the bankrupt after the act of bankruptcy, can have no effect in the case, as it cannot operate to rescind the contract. *Barnes v. Freeland*, 6 Term Rep. 80,† *Smith v. Field*, 5 Term Rep. 402,‡ in which latter case the Court, referring to a case of *Salte v. Field*, 5 Term Rep. 211,§ take the distinction that though before the act of bankruptcy the vendee may rescind the contract, yet that after that time he cannot. The principal questions therefore in this case are, whether the claim made amounted to a stoppage, and whether at the time they were claimed they were still *in transitu*? It is true that the doctrine laid down by Lord HARDWICKE in *Snee v. Prescott*, 1 Atk. 250, “that a consignor may get the goods back again by any means, provided he does not steal them,” is very strong. But in that case as well as in all the cases since, in which that doctrine has been recognized, the goods have been actually seized by the consignor before they have come into the possession of the consignee; whereas in this case the vendor was not able to get them out of the wharfinger’s hands into his own possession, *and is now claiming to have a right of action against the wharfinger for not delivering them. Had the wharfinger delivered the goods to the plaintiffs on their demand, perhaps they would have been entitled to retain them; but Lord ELDON, when this cause was tried, seemed to entertain some doubt as to their right to sue the wharfinger. Though if the plaintiffs had put their mark upon the goods while in the warehouse of the wharfinger, or if the wharfinger had agreed to hold them for the plaintiffs, such circumstances might have amounted to a stoppage; still it may be very questionable whether a mere notice to the wharfinger of a right to the goods is tantamount to a stoppage. In considering whether the goods were *in transitu* at the time the notice was delivered to the

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† 3 R. R. 125.

‡ 2 R. R. 630.

§ 2 R. R. 568.

wharfinger, it may be observed that in all the cases on this subject expressions have been used which must be deemed figurative; such as that the goods must have come to the "corporal touch" of the consignee, which Lord KENYON in *Ellis v. Hunt*, 3 Term Rep. 468,† allows to be a figurative expression, and that they must have come "to their journey's end," which if strictly true would do away with the authority of *Ellis v. Hunt*. Now here the wharfinger must be deemed the agent of the bankrupt, since he received the goods on his account and debited him with the freight and charges.

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LORD ALVANLEY, Ch. J.:

The case before the Court is shortly this. Gard being a trader at North Tawton, gives orders to the plaintiffs to send the goods in question to him from London, but does not direct that they should be sent by any particular ship; his orders were, that they should be sent to Exeter to be forwarded to him at North Tawton. They were accordingly shipped, arrived at Exeter, and were put into the hands of a wharfinger to be forwarded to their journey's end. In the books of the wharfinger they were put to the account of Gard as the person to whom they were directed, and he was considered as the wharfinger's paymaster. In this state of things the letter of the 16th September was received by the plaintiffs, the meaning of which I take to be this; the vendee says, "my situation is such that I will not receive the goods, and you may take them back again if you think proper." The plaintiffs immediately on the receipt of this letter sent to the wharfinger and forbade him to deliver them according to the direction. The wharfinger promised not to deliver them till he could do so with safety, notwithstanding which he afterwards delivered *them to the assignees of Gard. The question is, whether the goods in the hands of the wharfinger were in such a situation that the vendors could stop them. The cases cited for the plaintiffs have established that where there is a contract for the sale of goods, and a delivery has been made to a middle man, who is merely the vehicle between the buyer and seller, the latter, in case of the

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† 1 R. R. 743.

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insolvency of the former, may stop them at any time before they have arrived in such a state as to be in the actual or constructive possession of the buyer. The only question is, whether these goods are to be considered as having been in the hands of a middle man, or as having been taken in the possession of the person for whom they were ultimately intended? If in the course of the conveyance of the goods from the vendor to the vendee, the latter be allowed to exercise any act of ownership over them, he thereby reduces the goods into possession, and puts an end to the vendor's right to stop them. So, though it has been said that the right of stoppage continues until the goods have arrived at their journey's end, yet if the vendee meet them upon the road and take them into his own possession, the goods will then have arrived at their journey's end with reference to the right of stoppage.† I am of opinion that the wharfinger in this case not having been particularly employed by the vendee, is to be considered as a middle man. And it has almost been admitted in the argument, that if the plaintiffs could have got the goods into their possession, they would have had a right to keep them. But then another question arises, viz. admitting that the plaintiffs would have had a right to retain the goods had they got them into their own *possession, whether they have any right of action to recover them out of the hands of the middle man? I am very far from wishing that it should be understood that an action may be brought by the person entitled to stop the goods against any carrier who, after notice to retain the goods, delivers them to the person to whom they were originally consigned: such a rule would be highly oppressive to carriers. A carrier knows nothing of the vendor. In the case of a conveyance by ship, the master signs a bill of lading by which he engages to deliver the goods to the consignee or his order: and if he deliver them accordingly, it can hardly be supposed that he thereby subjects himself to an action, because the vendor has a

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† This *dictum* is confirmed by the case of *London & N. W. Ry. Co. v. Bartlett* (1861) 7 H. & N. 400, 31 L. J. Ex. 92; 5 L. T. 399 (overruling *Holst v. Pownall*, reported in 1 Esp. 240,

and 2 B. & P. 461 *n.*), and see per BOWEN, L. J. in *Kendal v. Marshall* (1883) 11 Q. B. D. 356, 369, 52 L. J. Q. B. 313; 48 L. T. 951.—R. C.

right to stop the goods *in transitu*. In the present case, however, full notice was given to the wharfinger by the consignor, and no demand was made on the part of the original consignee. The consignor by letter demanded possession; and the wharfinger admitted himself to be in the nature of a stakeholder bound to deliver according to the right. Without determining, therefore, whether the wharfinger would have been liable without notice, or even after notice, supposing no undertaking to have been made by him, I think it clear that the defendant in this case having undertaken "not to deliver the goods out of his custody till he was certain of a safe delivery," is answerable to the plaintiff.

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HEATH, J.:

I am of the same opinion. The general rule of law is admitted on all hands. The only point in this case depends upon the application of that rule to the facts. The question therefore is, whether these goods in point of fact were stopped *in transitu*? Here there certainly was no corporal touch; but that took place which was equivalent to it. The plaintiffs gave notice to the wharfinger and demanded the goods as their property: and the wharfinger undertook not to deliver them till he was certain of a safe delivery. It is unnecessary therefore to consider whether without such undertaking the defendant would have been liable. Whenever that case occurs it will receive due consideration from the Court. In this case doubts have arisen with some of the Court respecting the effect of the letter of the 16th of September. It appears to me however that it will not vary the plaintiffs' right. In **Berwick v. Atkyn*, 1 Str. 165, the refusal by the bankrupt to receive the property seems to have been considered meritorious. So I think that the conduct of the bankrupt in this case was commendable.

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ROOKE, J.:

In this case there is no dispute respecting the rule of law. The only difficulty arises upon the application of the facts to the law. It is agreed that a contract once completely executed cannot be rescinded. If therefore the goods had got into the hands of the consignee, there is no doubt that he would have

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been precluded from giving a preference to any one. But while the goods are *in transitu* they may be stopped. Then can there be any doubt whether these goods were *in transitu* or not? The consignees did nothing to take possession of the goods while they remained with the wharfinger before the plaintiffs made their claim. That claim was made in consequence of information (which appears to me to have been very proper) that circumstances had arisen in the affairs of the consignees which made it improper for them to receive the goods. In what manner that information was obtained can make no difference in the case. The honesty of the consignees ought not to prejudice the plaintiffs' right. If indeed the consignees after getting the goods into their hands had given them up, the case would have been very different: but here the information was given while the goods were *in transitu*. I do not meddle with the question how far an action might be maintained against a carrier upon a bare notice not to deliver; but I do not say that such an action might not be maintained.

CHAMBERE, J.:

The 1st question is, whether these goods were *in transitu* at the time they were claimed by the plaintiffs? The goods were directed to be sent to North Tawton, where the bankrupt lived, and having been carried as far as they could go by water, they were delivered to a wharfinger to be forwarded to the bankrupt. While they were with the wharfinger the demand was made, no act having been done to shorten the journey. We cannot, therefore, without overturning all the cases, say the goods were not *in transitu*. The second objection is, that in order to entitle the plaintiffs to this action, they should have been taken actual possession of by the plaintiffs, either by corporal touch, or something equivalent thereto. The first delivery to the carrier vests the property in the vendee, but the property so vested is a defeasible property, and may be defeated by the insolvency of the vendee. When therefore the vendor, having *notice of such insolvency, makes a demand upon the person in whose custody the goods are, he thereby defeats the contract. If this were not the case, the carrier would have it in his power to decide between

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the vendor and the assignees of the bankrupt. In the present case there can be no doubt of a conversion having taken place. Cases of difficulty may indeed arise ; as, if a carrier upon reasonable doubt should refuse to deliver up the goods without further authority, or until the circumstances of the case are ascertained : for a demand and refusal do not always constitute a conversion ; there are many cases to the contrary. But here there was an actual conversion, the defendant having delivered the goods contrary to his own undertaking. There is another point however upon which I have entertained some doubt. The vendor did not get possession of these goods by his own diligence and care, or in consequence of casual information ; but through the intervention of the bankrupt himself eight days after the act of bankruptcy committed. That circumstance raised some doubt in my mind ; since it appeared that the bankrupt had thereby given a preference to the plaintiffs over the rest of his creditors. But still upon the whole I am inclined to agree with the rest of the Court. I am not fond of multiplying small distinctions, and think that too many have been already taken : and the general inconvenience will not be very great, since many cases of this kind are not likely to arise. It seems indeed that there will be a certain degree of discretion vested in the bankrupt, since he will be empowered to accept goods which are coming to him from one consignee, and to give notice to another consignee to stop them *in transitu*. But as no fraud appears to have been committed on the part of the plaintiffs in this case, I am inclined on this point, as well as the others, though not without some doubt, to concur with the rest of the Court.

Per CURIAM :

Let the verdict be entered for the plaintiffs for 99l. 17s.

1801.
June 19.

TAPPENDEN AND OTHERS, ASSIGNEES OF BRAY, *v.*
RANDALL.

(2 Bos. & P. 467—472.)

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A. in consideration of 210*l.* paid by B. gave a bond for the payment of an annuity to the latter of 100 guineas until the hop-duties should amount to a certain sum. Before this event had taken place A. brought an action to recover back the 210*l.* of B. Held that the action was maintainable.†

THIS cause came on to be tried before Lord ALVANLEY, Ch. J. at the second Sittings in this Term, when a verdict was found for the plaintiffs, damages 216*l.* costs 10*l.* subject to the opinion of the Court on the following case :

The declaration stated, that the defendant, before the bankruptcy of Bray, was indebted to Bray in 300*l.* for money lent, and 300*l.* for money paid, and that he was indebted to the plaintiffs after the bankruptcy in 300*l.* as well for money before Bray became a bankrupt received to Bray's use, as for money after the bankruptcy received to the use of the assignees, and upon an account stated with the plaintiffs as assignees.

Bray duly became a bankrupt, and a commission was issued against him, under which the plaintiffs were declared his assignees. On the 12th of November, 1800, previous to any act of bankruptcy, in consideration of 210*l.* then paid by Bray to the defendant, the defendant entered into a bond in the penal sum of 999*l.* with a condition as follows : "Whereas the said William Randall hath, in consideration of two hundred and ten pounds to him paid by the said John Bray, at the time of the sealing and delivery of the above-written bond or obligation, contracted and agreed to pay unto the said John Bray or his assigns on the first day of May in every year, one annuity or clear yearly sum of one hundred and five pounds until he the said William Randall, his heirs, executors, or administrators, can prove by evidence, or otherwise to abide by the report of three eminent hop-merchants, who shall make it appear to the satisfaction of the said John

† This case is cited by BOWEN, L. J. in *Hermann v. Zeuchner* (or *Jeuchner*) (C. A. 1885) 15 Q. B. D. 561; 54 L. J. Q. B. 340; but the principle is questioned by the other members of the Court. The contrary view is again supported by the

decision of a Divisional Court (MATHEW and SMITH, JJ.), in *Howard v. Refuge Friendly Society* (1868) 54 L. T. 644. See also *Kearley v. Thomson* (C. A. 1890) 24 Q. B. D. 742; 59 L. J. Q. B. 288; 63 L. T. 150.—R. C.

Bray, his executors, administrators, and assigns, that the revenue received by Government by reason of the duties now assessed by Parliament upon hops grown in Great Britain, shall in the present or any one year hereafter amount to a full and clear revenue or sum of two hundred thousand pounds, such duties to be taken according to those at present imposed by Parliament, and not to be affected by any subsequent alteration whatever; and for securing the due payment of the said annuity of one hundred and five pounds until such event, the said William Randall hath *entered into the above-written bond or obligation: Now therefore the condition of the above-written bond or obligation is such, that if the said William Randall, his heirs, executors, administrators, or assigns, shall and do from the day of the date of the above bond, well and truly pay, or cause to be paid unto the said John Bray or his assigns, one annuity or clear yearly sum of one hundred and five pounds of lawful money of Great Britain on the first day of May in each and every year, without any deduction or abatement whatsoever, until the said William Randall, his heirs, executors, or administrators shall prove by evidence, or otherwise abide by the report of three eminent hop-merchants, who shall make it appear to the satisfaction of the said John Bray, or his assigns, that the revenue received by Government by reason of the duties now assessed by Parliament upon hops shall in the present or any one year hereafter amount to a full and clear revenue or sum of two hundred thousand pounds, such duties to be taken according to those at the present time imposed by Parliament, and not to be affected by any subsequent alteration therein; and shall and do make the first payment of the said annuity of one hundred and five pounds on the first day of May in the year of our Lord 1802, then and in such case or cases the above-written bond or obligation should be void and of none effect, otherwise it shall be and remain in full force and virtue.

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“WM. RANDALL (Seal).

“Sealed and delivered (being first legally stamped, and several obliterations and interlineations being made) in presence of

“JOHN BROAD.

“WM. MANN.

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“ Received at the time of the sealing and delivery of the within-written bond or obligation of and from the within-named John Bray the sum of two hundred and ten pounds (being the consideration paid for the annuity within secured), by me. Signed in the presence of John Broad, Wm. Mann. £210

“ WM. RANDALL.”

[*469] Before the bringing of this action the plaintiffs applied to the defendant, stating that they considered the bond to be illegal, *and demanding the return of the 210*l.* and interest, which was refused.

If the Court should be of opinion that the plaintiffs were entitled to recover back the said sum of 210*l.* with interest thereon, then the verdict to stand. If the Court should be of opinion that the plaintiffs were entitled to recover back the said sum of 210*l.* but were not entitled to interest thereon, then the verdict to be entered for 210*l.* damages and 40*s.* costs. If the Court should be of opinion that the plaintiffs were entitled to recover nothing, a nonsuit to be entered.

Bayley, Serjt. for the plaintiffs :

The plaintiffs' right to recover in this action results from two points, which are both clearly in their favour, viz. 1st, That the bond stated in the case, and upon which the money was advanced is void ; and, 2ndly, that this action is brought before the event has happened, which the parties had in contemplation at the time of entering into the contract. 1st, That the bond is void, most clearly appears from *Atherfold v. Beard*, 2 Term Rep. 610,† and *Shirley v. Sankey*, 2 Bos. & P. 136.‡ (This was admitted on the other side.) 2ndly, The money advanced by the bankrupt was not advanced on a contract which was either *malum prohibitum* or *malum in se*, but merely money advanced on a consideration which has failed, the bond given to secure its repayment not being such as can be enforced at law. In *Cotton v. Thurland*, 5 Term Rep. 405, which was an action to recover a deposit from a stake-holder on a wager respecting the event of a boxing

† 1 R. R. 556.

‡ P. 588, *ante*.

match, it was admitted that as long as the contract is executory, money so paid may be recovered back; and though that case was decided on the ground of the action being brought against the stake-holder, who not having paid it over was justified in refusing to return it, yet Lord KENYON alludes to the distinction between contracts executory and executed when he says, "this is not like the case of a policy of insurance, where the risk having been run the party has attempted to regain his money again." Indeed, in *Lowry v. Bourdieu*, Doug. 468, where the insured in an illegal policy attempted to recover back the premium after the risk had been run, BULLER, J. says "there is a sound distinction between contracts executed and executory, and if an action is brought to rescind a contract you must do it while the contract continues executory;" and observes that if the action had been commenced before the risk was over, the plaintiff might have had a ground *for his demand. With respect to the late case of *Vandyck v. Hewitt*, 1 East, 96,† where it was held that the premium paid on an insurance to cover enemy's property could not be recovered back, there the risk had been run before the action was brought, and the act of insuring enemy's property was an offence against the policy of the state. Indeed in *Lacaussade v. White*, 7 Term Rep. 535, money paid on an illegal wager was recovered back after the event upon which the wager proceeded had turned out against the plaintiff, the Court holding it more consonant to sound policy to permit money paid on an illegal consideration to be recovered back by the party paying it, than by denying the remedy to give effect to the illegal contract.

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Best, Serjt. for the defendant :

It is perfectly clear that where money has been advanced without any consideration it may be recovered back, but if advanced on a consideration which fails because the contract is illegal, then the rule applies *in pari delicto potior est conditio possidentis*. The only case in which this rule has ever been impeached at all is *Lacaussade v. White*, and that decision was treated by the Court in *Vandyck v. Hewitt* as not quite sound, LE BLANC, J. saying it had since been "very much canvassed in *Howson v.*

† Page 516, *ante*.

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Hancock,† where it was considered that money deposited on an illegal wager and paid over to the winner could not be recovered from him." If the contract in the present case be a legal one, the bond is not void but the plaintiff will have the benefit of the consideration he has advanced when his time comes to demand payment of the annuity ; if it be not legal the rule of *potior est conditio possidentis* applies. It is not necessary that the contract should be immoral, it is sufficient if it be illegal ; and indeed in *Houison v. Hancock*, Lord KENYON so treats it when he says, " here the money was not paid on an immoral, though an illegal consideration," (viz. a wager on a horse-race,) and yet the plaintiff was not permitted to recover.

LORD ALVANLEY, Ch. J. :

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Without taking time to look into all the cases which have been cited, it does appear to me to be clear that the plaintiff in this case is entitled to recover back the money which he has advanced. In the present transaction there was no moral turpitude whatsoever : and though it has sometimes been held that where there is moral turpitude in the contract, the Court will not allow the party who has advanced *money on such a contract to recover it back ; yet no argument of that sort can be urged in the present case. The simple statement of this case is, that after the money had been paid, but before the time had arrived at which the event in contemplation of the parties contracting was to take place, it was found out that the contract was illegal ; and therefore the money paid was demanded back again. There is hardly any case of this sort in which the distinction between immoral and illegal transactions has not been taken. I do think that there is a material distinction between wagers which are not recoverable on account of some inconvenience which the public may sustain by the open discussion of the questions to which they give rise, and those which are in themselves immoral. In the present case one party has paid money without any consideration and is therefore entitled to recover it back from the party to whom he paid it.

† 8 T. R. 575.

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I am of the same opinion. It seems to me that the distinction adopted by Mr. Justice BULLER between contracts executory and executed, if taken with those modifications which he would necessarily have applied to it, is a sound distinction. Undoubtedly there may be cases where the contract may be of a nature too grossly immoral for the Court to enter into any discussion of it; as where one man has paid money by way of hire to another to murder a third person. But where nothing of that kind occurs I think there ought to be a *locus pœnitentiæ*, and that a party should not be compelled against his will to adhere to the contract.

ROOKE, J. :

This is an action brought by assignees to recover back money paid by way of consideration for a bond which clearly could not be put in force, and I think this action may well be supported. There is nothing criminal in the contract which was entered into between these parties; nor has that contract been executed; nor indeed is this a case where money which has been paid over by a stake-holder is sought to be recovered. I therefore see no reason to prevent the present plaintiffs from recovering: and I wish it to be understood that I fully accede to the doctrine laid down by Mr. Justice BULLER respecting contracts executory and executed. If in this case any money had been paid upon the bond I should have felt great difficulty respecting the right of the plaintiffs to recover.

CHAMBRE, J. :

Undoubtedly there is a great deal of refinement in the discussion which arises out of this species of action: but *still I think that the nature of this contract is not such as to prevent the plaintiff from recovering the money which he has advanced without consideration. The contract which the parties entered into is not prohibited by any declaration of any positive law upon the subject, nor is it *malum in se*: but it is a contract which cannot be put in force merely because it is inconvenient that the merits of the question should be publicly discussed. Indeed, supposing

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the parties able to refer to some published documents respecting the amount of the duties, all objections to the wager would cease. Before the contract was in any way executed, it being found that the aid of the law could not be had to enforce the bond, application was made to the defendant to pay back the money which had been advanced, and the defendants having refused to pay it, I think the plaintiffs are entitled to recover in this action.

Postea to the plaintiffs.

It was then suggested to the Court that it would be necessary for them to give an opinion respecting the amount which the plaintiffs were entitled to recover; upon which the Court observed that in an action for money had and received, nothing but the net sum advanced without interest could be recovered,† and that the verdict must therefore be entered for the lesser sum.

1801.
June 20.

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BAGOTT v. ORR.†

(2 Bos. & P. 472—479.)

Prima facie every subject has a right to take fish found upon the sea-shore between high and low water-mark; but such general right may be abridged by the existence of an exclusive right in some individual. *Quare*. If there be a *prima facie* right in the subject to take fish-shells found on the sea-shore between high and low water-mark?§

TRESPASS. The first count was for breaking and entering the plaintiff's closes, called the Foot-Muscle-Skear, the Great-Out-Muscle-Skear, and the Sea-Shore, in the parish of Keysham, and plaintiff's shell-fish and shells there finding, catching, taking, and carrying away and converting and disposing thereof to defendant's own use. The 2nd count was for breaking and entering the same closes, and with defendant's feet and the feet of

† Vide *Moses v. Macferlan*, 2 Burr. 1005; and *Walker v. Constable*, 1 B. & P. 306; *Marshall v. Poole*, 13 East, 98; *Slack v. Lowell*, 3 Taunt. 157.

‡ Cited by BAGGALLAY, L. J. in his dissenting judgment in *Corporation of Saltash v. Goodman* (C. A. 1881) 7 Q. B. D. 106, 116. The

judgment of the majority in that case was reversed by the House of Lords (1882) 7 App. Ca. 633.—B. C.

§ Vide *Rogers v. Allen*, 1 Campb. 309, 312; *Marshall v. Poole*, 13 East, 98; *Blundell v. Catterall*, 5 B. & A. 268.

his servants in walking, treading up, trampling upon, subverting and spoiling plaintiff's soil, earth, and sand, and with the feet of cattle and with *the wheels of carriages and the keels of boats treading up, trampling, &c. and plaintiff's shell-fish and shells, breaking, crushing, and destroying, and with spades, shovels, mattocks, pickaxes and other instruments, digging and making holes and pits, and turning up, &c. plaintiff's earth, soil, and sand, and digging up, raising up, and getting up divers large quantities of plaintiff's shell-fish and shells, and carrying away the same and converting and disposing thereof to defendant's own use. There were several other counts for breaking and entering plaintiff's several fishery and his free fishery, on which issues in fact were joined.

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The defendant pleaded, 1st, the general issue. 2dly, As to the trespasses mentioned in the two first counts that the closes therein severally mentioned were the same, "and that the said closes in which, &c. at the said several times when, &c. were and still are and from time immemorial have been part and parcel of a certain arm of the sea, in which every subject of this realm at the said several times when, &c. of right had, and of right ought to have had and now hath, and of right ought to have the liberty and privilege of fishing and catching, digging for, raising, getting, taking and carrying away shell-fish and shells there, therefore defendant being a subject of this realm at the said several times when, &c. entered into the said closes in which, &c. so being part and parcel of the said arm of the sea to fish therein and to catch, dig for, raise, get, take, and carry away the shell-fish and shells there, and did then and there fish, and caught, took, and carried away the said shell-fish and shells in the first count mentioned, and also dug up, raised up, and got up, took and carried away the said other shell-fish and shells in the second count lastly mentioned, as it was lawful for him to do, and for the digging up and carrying away of the said shell-fish, he entered the said closes in which, &c. by himself and with other persons, and with the said cattle, carts, waggons, and other carriages, and the said boats, lighters, and other vessels, the same being reasonable, proper, and necessary in that behalf, and in so doing he necessarily and unavoidably with his

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feet and the feet of those other persons in walking a little trod up, trampled upon, subverted and spoiled the soil, earth, and sand in the second count mentioned, and with the feet of the said cattle, and with the wheels of the said carts, waggons, and other carriages, and with the keels of the said boats, lighters, and other vessels a little trod up, trampled upon, tore *up, and subverted and spoiled other the soil of plaintiff's last-mentioned closes, and the said shell-fish and shells in the second count first mentioned necessarily and unavoidably a little broke, crushed, and destroyed, and with the said spades, shovels, mattocks, pickaxes, and other instruments, the same being useful, proper, and necessary in that behalf, and in digging up, raising, and getting the said shell-fish and shells in the second count lastly mentioned, necessarily and unavoidably dug and made the said holes and pits in plaintiff's said closes, and necessarily and unavoidably with the spades, shovels, mattocks, pickaxes, and other instruments dug up, turned up, subverted, and spoiled a little of the earth, soil, and sand in the said closes, doing as little damage on that occasion as he could, which are the same, &c. whereof, &c. And this, &c. wherefore, &c.

Upon this, the plaintiff new assigned, alleging that defendant on the days in the first count mentioned broke and entered plaintiff's closes in the first count mentioned, "being certain closes lying within the flux and reflux of the tides of the sea in plaintiff's manor of Keysham, and the said shell-fish and shells there then found, caught, took, and carried away and converted and disposed thereof to his own use, when the same closes in which, &c. were left dry and were not covered with water." And also that defendant on the days and in the manner in the second count mentioned broke and entered plaintiff's closes, "being certain closes lying within the flux and reflux of the tides of the sea within plaintiff's said manor of Keysham, and with his feet, &c. trod up, &c. the said earth, soil, and sand, in the second count mentioned, and with the feet of the said cattle in that count mentioned, and with the wheels of the said carts, &c. and with the keels of the said boats, &c. trod up the said other soil in plaintiff's last-mentioned closes in the said second count mentioned, and plaintiff's said other shell-fish and shells in the

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second count mentioned, broke, crushed, &c. and with spades, &c. dug, and made holes, &c. and raised up and got up the said shell-fish and shells, &c. and took and carried away the same, and converted and disposed thereof, &c. when the last-mentioned closes in which, &c. were left dry and were not covered with water, as plaintiff hath in the first and second counts of the said declaration complained against him, which several trespasses so above new assigned are other and different trespasses, &c. Wherefore, &c.

To the new assignment the defendant pleaded, 1st, the general issue; 2dly, "that the said closes first above newly assigned, and the several closes secondly above newly assigned are, and at the said several times, &c. were the same closes and not other or different closes, and are and at those times when, &c. were certain rocks and sands of the sea, lying within the flux and reflux of the tides of the sea; and that the said shell-fish and shells in the said closes in which, &c. were certain shell-fish and fish-shells, which at the said several times when, &c. were in and upon the said rocks and sands of the sea, and which but a little before the said times when, &c. were by the ebbing of the tides of the sea left there in and upon the said closes in which, &c.; and that in the said closes in the said declaration mentioned, every subject of this realm at the said several times when, &c. of right had and of right ought to have had, and now hath and of right ought to have the liberty and privilege of getting, taking, and carrying away the shell-fish and fish-shells left by the said ebbing of the tides of the sea in and upon the said closes, in which, &c. wherefore the defendant being a subject of this realm at the said several times when, &c. entered into the said closes in which, &c. to get, take, and carry away the shell-fish and fish-shells left by the ebbing of the tides of the sea in and upon the said closes in which, &c. and then and there got, took, and carried away the said shell-fish and shells in the said first count mentioned, and also got, and for that purpose with spades, shovels, mattocks, pickaxes, and other instruments necessarily dug up and raised up, and took and carried away the other shell-fish and shells in the second count lastly mentioned; and for the getting, taking, and carrying away of the said shell-fish and shells, the

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defendant at the said times when, &c. entered the said closes in which, &c. as it was lawful for him to do by himself and with other persons, and with the said cattle, carts, waggons, and other carriages, and the said boats, lighters, and other vessels, the same being reasonable and proper and necessary in that behalf, and in so doing he necessarily and unavoidably with his feet and the feet of those other persons in walking, a little trod up, trampled, subverted, and spoiled the soil, earth, and sand in the said second count mentioned, and with the feet of the cattle, and with the wheels of the said carts, waggons, and other carriages, and with the keels of the said boats, lighters, and other vessels, a little trod up, trampled upon, tore up, subverted, and spoiled other the said soil of the said last-^{*}mentioned closes of the plaintiff, and the shell-fish and shells in the second count first mentioned, necessarily and unavoidably a little broke, crushed, and destroyed, and with the said spades, shovels, mattocks, pickaxes, and other instruments, the same being useful, proper, and necessary in that behalf, in digging up, raising, and getting the said shell-fish and shells in the said second count lastly mentioned, necessarily and unavoidably dug and made the said holes and pits in plaintiff's said closes, and necessarily and unavoidably with the said spades, shovels, mattocks, pickaxes, and other instruments dug up, turned up, subverted, and spoiled a little of the said earth, soil, and sand in the said closes, as it was lawful for him to do for the causes aforesaid, doing as little damage on that occasion as he could, which are the same, &c. whereof, &c. And this, &c. wherefore, &c."

To this plea there was a replication, traversing the right of every subject to take shell-fish and shells, and a special demurrer thereto, because it traversed matter of law; but the Court seeming to think, that the replication was clearly bad, it was abandoned by the plaintiff's counsel, who relied upon objections to the plea.

Marshall, Serjt. in support of the plea :

The question is, whether every subject of the realm has a right to take the shell-fish and shells which are left upon the sea-shore by the ebbing of the tides. The right of fishing in the sea is acknowledged by all nations; it is universal, and part of the law

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of nations. Grotius de Jure Bel. ac Pac. lib. 2, c. 2, s. 3. And according to Grotius no person can have any property either in the main sea, or in the principal arms of the sea; neither can a man have any property in the shores and sands of the sea: these are all incapable of improvement, and never can be exhausted by the only uses to which they can be applied, namely, those of supplying fish and sand. Bracton (lib. 1, c. 12, fo. 7, b,) adopting the doctrine of the civil laws, says, “Naturali vero jure communia sunt omnia hæc, aqua profluens, aer, et mare, et littora maris, quasi maris accessoria; nemo enim ad littus maris accedere prohibetur dum tamen a villis et ædificiis absteineat: quia littora sunt de jure gentium communia sicut et mare.” And he adds, “Publica vero sunt omnia flumina et portus; ideoque jus piscandi omnibus commune est in portu et in fluminibus; riparum etiam usus publicus est de jure gentium sicut ipsius fluminis.” So Sir Matthew Hale in his Treatise de Jure Maris, part 1, cap. 4, Hargrave’s Law Tracts, p. 10, 11, observes, “In the sea the King of England *hath a double right, namely, a right of jurisdiction, which he ordinarily exerciseth by his admiral, and a right of propriety or ownership. The King’s right of propriety or ownership in the sea is evidenced principally in these things that follow: 1st, The right of fishing in this sea and the creeks and arms thereof is originally lodged in the Crown, as the right of depasturing is originally lodged in the owner of the waste whereof he is lord, or as the right of fishing belongs to him that is the owner of a private or inland river. But though the King is the owner of this great waste, and as a consequent of his property hath the primary right of fishing in the sea, and the creeks and arms thereof, yet the common people of England have regularly a liberty of fishing in the sea, or creeks or arms thereof as a public common of piscary; and may not without injury to their right be restrained of it unless in such places, creeks, or navigable rivers where either the King or some particular subject hath gained a propriety exclusive of that common liberty.” In the same treatise, p. 12, it is said, “that *de jure communi* between the high water and low water-mark, doth *primâ facie* belong to the King; *Constable’s case*, 5 Co. Rep. 107, and *Dyer*, 326, b.; although it is true that such shore may be and

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commonly is parcel of the manor adjacent ; and so may belong to a subject, yet *primâ facie* it is the King's." From *Constable's* case, 5 Co. Rep. 107, 2 Rol. Abr. 170, it appears that the shore may belong to the subject either in gross or as parcel of his manor : but merely being the manor of a particular person is not sufficient to exclude those who have a right to fish there. One may have a manor and another the right of fishing in the water ; but if a man would claim a right of fishing in the water of another, the proof of the right lies upon him. In *Warren v. Matthews*, 6 Mod. 73, S. C., 1 Salk. 357, Holt, Ch. J. says, " Every subject of common right may fish with lawful nets in a navigable river as well as in the sea ; and the King's grant cannot bar him thereof." So in 1 Mod. 105, *Lord Fitzwalter's* case, Hale, Ch. J. says, " In case of a river that flows and reflows, and is an arm of the sea, there *primâ facie* it is common to all ; and if any one will appropriate a privilege to himself the proof lieth on his side ; for in case of an action of trespass for fishing there, it is a good justification to say that the 'locus in quo est brachium maris in quo unisquisque subjectus Domini Regis habet et habere debet liberam piscariam.' The soil of the river Thames is in the King, and the Lord Mayor is conservator of the river, but it is common to all fishermen, *and therefore there is no contradiction in the soil being in one and the right of fishing in the river common to all fishermen." Again in *Ward v. Creswell*, Willes' Rep. 265, S. C. 16 Vin. Abr. 354, tit. Piscary, B., the Court held that all the subjects of England of common right might fish in the sea, it being for the good of the commonwealth, and for the sustenance of all the people of the realm ; and that therefore a prescription for it as appurtenant to a particular township was void, and as absurd as a prescription would be for travelling the King's highway, or for the use of the air as appurtenant to a particular estate. The statute 7 Jac. I. c. 18, after stating in the preamble that divers persons having lands adjoining to the sea-coast in the counties of Devon and Cornwall, had of late interrupted the bargemen and such others as had used at their free wills and pleasures to fetch sea-sand and take the same under the full sea-mark, as they had theretofore used to do, enacts that all persons in the

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said counties should be at liberty to take sea-sand at all places under the full sea-mark. That statute was in fact a full recognition of the right of the subject to use the shore of the sea in every way in which it could be serviceable to him. It proves that his right is not confined to the privilege of taking shell-fish left on the shore by the ebbing of the tides, but that he may also take the fish-shells and even the sand of the shore.

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Best, Serjt. contrà :

Admitting the general right of the subject to take the fish of the sea, still in this case that general right is circumscribed by the circumstance of the place in which these shell-fish and fish-shells were taken being part of the manor of Keysham. Unless therefore the defendant set up a right of common on the soil, he cannot support the easement which he claims. *Primâ facie* the shores of the sea belong to the King, and he may grant any part of them to a subject either reserving or not, as he pleases, a general right of fishery to all his subjects. The plaintiff ought not to be called upon to prescribe for a right of fishery over that which is admitted to be his own, for when once it is established that the *locus in quo* belongs to the plaintiff, it must be presumed to be exclusively his, unless some inconsistent right is set up by the defendant. The common-law right of the subject to go upon the shores of the sea between high and low water-mark only applies to cases where no exclusive right is vested in any individual. Now it appears from the passage cited from Hale's Treatise, Hargrave's Tracts, p. 12, that an exclusive right to the shore may belong to a subject, though *primâ facie* it is in *the King. Indeed in pages 26 and 27 of the same tract, Sir Matthew Hale speaking of the sea-shore says, "It may not only belong to a subject in gross, which possibly may suppose a grant before time of memory, but it may be parcel of a manor," and proceeds to mention the several ways by which such a right may be evidenced. To the same effect is Com. Digest. tit. Navigation A. and the case of *The Abbott of Ramsay*, Dyer 326, b. ; and the same is admitted by Lord MANSFIELD in the case of *Carter v. Murcot*, 4 Burr. 2164. Although, however, the common-law right of the subject should be established to take sea-fish, yet it by no means

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follows that the subject has a right to take the shells which are thrown upon the sea-shore. It is well known that in many parts of England much of the various matter which is deposited upon the shore by the sea, belongs to the owners of the adjacent soil, and is disposed of by them to very great advantage. The statute 7 Jac. I. c. 18 which has been cited in support of the right of the subject to take whatever is found between high and low water-mark, seems to afford a contrary inference; for it is to be observed that it is an enacting and not a declaratory law, and that a peculiar privilege is thereby granted to the men of Devon and Cornwall, which peculiar privilege it would have been absurd to grant, if all the people of England had been entitled thereto by common law.

The Court were of opinion that if the plaintiff had it in his power to abridge the common-law right of the subject to take sea-fish, he should have replied that matter specially, and that not having done so, the plaintiff must succeed upon his plea as far as related to the taking of the fish; but observed that as no authority had been cited to support his claim to take shells, they should pause before they established a general right of that kind. They therefore offered to allow the defendant to amend his plea without costs, by striking out his claim to the fish-shells, and shaping his justification in such way as he should be advised. Which offer was accordingly accepted.†

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(2 Bos. & P. 485—495.)

The rule in (*Wylde's*) case (6 Co. Rep. 16, whereby a gift to A. and his children, A. having no child at the time of the devise, creates an estate tail in A.) applies, although the testator gives the parent an express power of appointing the estate amongst his children.

THIS case was sent by the LORD CHANCELLOR for the opinion of the Court.

† See Bro. Customs, pl. 46, cites 18 Ed. IV. 18, 19; Vin. Ab. Trespass, p. 476.

‡ *Clifford v. Koe* (1880), 5 App. Ca. 447, 43 L. T. 322.

John Seale, by his will, dated the 11th of February, 1774, devised to his wife for life his messuage Barton farm, and demesne lands called Mount Boon, (with the furniture, stock, &c. also for her life,) and an annuity of 50*l.* for her life, charged upon a messuage called Combe, with power to distrain in case of non-payment; he then devised to Richard Harris and his heirs, all his manors, lordships, messuages, lands, tenements, houses, hereditaments, and premises, with their appurtenances, in the county of Devon, to have and to hold the same to the said R. H., his executors, administrators, and assigns, for a term of 200 years, without impeachment of waste upon trust, for the purposes and under the provisos thereafter mentioned, and from and after the determination of the said term upon trust and to the use of the said R. H. during the life of his only son John Seale, to support contingent remainders, nevertheless to permit his said son J. S. to receive the rents and profits during his life without impeachment of waste, and from and after his decease to the use of the 1st son of the said J. S. to be begotten on the body of such woman as he should thereafter happen to marry, and the heirs male of such 1st son lawfully issuing; and for want and in default of such issue, then to the use of the 2nd son in like manner, and so to the 3rd, 4th, and every other son and sons of the said J. S. and the heirs male of the bodies of every such son and sons *lawfully issuing, the eldest of every such son and sons, and the heirs male of his and their body and bodies always to take place and be preferred before the younger of such son and sons, as they and every other of them should be in seniority of age and priority of birth; and for want and in default of such issue male of his said son J. S. then upon trust, and to and for the only use and behoof of his daughter Elizabeth Seale, her heirs and assigns for ever, and to and for no other use, intent, and purpose whatsoever; and as to the said term of 200 years he declared that it should be lawful for the said R. H., when his daughter E. S. should marry, to raise a portion of 4,000*l.* to be paid to her, and until that time to raise the annual sum of 250*l.* to be paid to her for her maintenance: after charging all his estates in the county of Devon with the payment of his debts, he devised all the rest, residue, and remainder of his lands and

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tenements not thereinbefore devised or disposed of whereof he should die seised in possession, reversion, or remainder, to his son J. S., his heirs and assigns, and all the rest of his personalty after payment of his debts and funeral expenses, he gave to R. H., and made him executor of his will, desiring him to see the same performed according to his true intent and meaning, nevertheless in trust, and to and for the only use and behoof of his said son J. S. On the 14th of February, 1774, the testator made the following codicil to his will: "I John Seale of Mount Boon, within the parish of Townstall in the county of Devon, Esq., do this 14th day of February, 1774, make and publish this codicil to my last will and testament, in manner and form following: first and principally it is my will and meaning, and I do hereby order and direct that no inventory of my goods and effects at Mount Boon be taken after my decease; it is likewise my will that all my lands and estates shall after my decease come to my son John Seale and his children lawfully to be begotten, with full power for him to settle the same, or any part or parts thereof, by will or otherwise, on them, or any of them, as he shall think proper: and for default of such issue, then that all my lands and estates come to my daughter Elizabeth Seale and her children lawfully to be begotten, with full power for her my said daughter to settle the same or any part or parts thereof, by will or otherwise, on them, or such of them as she shall think proper; and in default of such issue, it is my will and meaning that all my estates and lands shall belong to my said son and daughter equally between them, to whom in such case I do hereby give, devise, and bequeath the same: and whereas in and by my will Richard Harris is made a trustee for *payment of my debts, legacies, and expenses, I do hereby direct and order that if my said son John Seale can raise the money otherwise, it shall be at his option. My will further is, that a settlement of two hundred pounds a-year shall be made upon any woman my son John Seale may happen to marry, and that my estates, or so much of them as he shall think proper, be chargeable with the payment thereof: and lastly, it is my desire that this my codicil be annexed to and made part of my last will and testament to all intents and purposes." The testator being seised of or entitled to considerable

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lands and tenements in the county of Devon, and of no other real estates whatsoever except a messuage or tenement in the parish of St. Sidwell, in the county of the city of Exeter, died in September, 1777, leaving only two children (viz.) the said John Seale his only son, and the said Elizabeth his daughter, who was afterwards married, and is since dead, having left a son her only child, now in minority. At the time of making the codicil John Seale the testator's son was married, but had no child, but afterwards in February, 1777, in the testator's life-time, John Seale the son had a daughter born, his eldest child (who is now living and lately married), and he has since had several other children, of whom his eldest son is now in minority.

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The question for the opinion of the Court was, What estate or interest did the plaintiff John Seale, the son of the said testator, take under the said will and codicil?

The case was twice argued; first in Hilary Term last, by *Best*, Serjt. for the plaintiffs, and *Bayley*, Serjt. for the defendants; and again in this term by *Shepherd*, Serjt. for the former, and *Lens*, Serjt. for the latter. * * *

The opinion of the Court was delivered by

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LORD ALVANLEY, Ch. J. who, after stating the will, proceeded thus:

Under this will the estate was given to the testator's son for life, with remainder in tail male to his children by any after-taken wife, remainder to the testator's daughter in fee. This will is stated in the case to bear date on the 11th of February, 1774; and the case further states, but whether accurately or not I much doubt, that on the 14th of February, 1774, only three days after the date of the will, the testator made the codicil in question. It is stated that at the time when the testator made his codicil, John Seale the testator's son was married, which seems to exclude the idea of his having been married at the date of the will, and indeed the expression in the will respecting children by any woman whom the testator's son should thereafter happen to marry, implies that no marriage was in immediate contemplation at the time when that will was made.

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It is also stated that at the time when the codicil was made the testator's son had no children, but that afterwards during the testator's life he had children, of whom the eldest is now in minority. The question submitted to this Court by the LORD CHANCELLOR is, What estate the testator's son John Seale took under the will and codicil? Notwithstanding the apparent inaccuracy in the statement of dates, it will not appear material that the case should be altered when the grounds are known upon which we all concur in thinking that the testator's son took an estate tail. If we could by any possibility have referred the limitation in the codicil to the will, seeing the disposition made in the latter to the children of the testator's son, we should have been desirous to *apply the word "children" in the codicil, to the same children who are described in the will; and should have been inclined to suppose that the testator did not intend by the codicil to disturb the dispositions of the will, but only to give a power to his son to settle the estates upon such of the children mentioned in the will as he should think proper. And when I first read this case I was inclined to think that the true construction. But on further consideration I think that cannot be the case: for by the will the testator had only given an estate in tail male to the first and other sons of his son, with a remainder in fee to his daughter, without any particular limitation to the daughter's children: and when we find in the codicil the same limitation to the children of the daughter as to the children of the son, it is impossible to apply the word "children" in the codicil to the same persons who are described by that word in the will. We are therefore of opinion that the codicil must be taken independent of the will; and that it is no longer to be considered as a codicil but as a substantive will: and the only question remaining for our consideration is, What estate the testator's son took under the words of that codicil? It has been insisted on the part of the plaintiff that the words of the codicil convey an estate tail: and *Wylde's* case (which is the leading case upon this subject) was cited and relied on. I will shortly state that case as it is reported in 6 Co. Rep. 16, and in Moore, 397, under the name of *Richardson v. Yardley*: for though the titles of the cases are different, and one is stated to have been in the

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41 Eliz. and the other in the 37 Eliz. it is hardly possible to consider them as different cases, especially as the name of Wylde occurs in both, and the circumstances are so nearly the same; and indeed in some books where the report in Moore has been cited, it has been said that the same case was better reported in Coke. According to the report of Coke, the devise was of land to A. for life, remainder to B. and the heirs of his body, remainder to Rowland Wylde and his wife, and after their decease to their children; Rowland and his wife then having a son and a daughter. It was resolved that Rowland Wylde and his wife took only joint estates for their lives: but a case was there put as good law, that if A. devise to B. and his children or issues, and he hath not any issue at the time of the devise, the same is an estate tail; and a case is cited from Serjeant Bendloes' Reports, which was a devise to husband and wife, and the men children of their bodies begotten, and it *did not appear in the case that they had any issue male at the time of the devise, and therefore it was adjudged that they had an estate tail to them and the heirs of their bodies. According to the report in Moore, POPHAM and GAWDY held that Wylde took an estate tail, notwithstanding that he had children living at the time of the devise, though FENNER and CLENCH thought it was only an estate for life. It appears therefore that two of the Judges were disposed to think that an estate tail would pass even in a case where children were *in esse* at the date of the will, and they all agree that if no children had been born it would have been an estate tail. The next case to which I shall allude is that of *King v. Melling*,† where the devise was to Bernard Melling for life, and after his death to the issue of his body by his second wife, his first being then alive, and for default of such issue over, with a proviso enabling Bernard Melling to make a jointure on his second wife; there RAINSFORD and TWYSDEN, JR., held that B. Melling took only an estate for life, but HALE, Ch. J. thought that it was an estate tail, and his opinion was afterwards confirmed by all the Judges in the Exchequer Chamber. The case referred to in the argument from Anderson,‡ and *Sonday's case* § are also authorities in favour of an estate tail: indeed in the latter case some argument

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† 1 Ven. 216, 225; 2 Lev. 58. ‡ 1 And. pl. 110. § 9 Co. Rep. 128.

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arose on the clause introduced into the will restraining alienation, but it was held to make no difference. I now come to the case of *Wharton v. Gresham*,† which appears to me to be very applicable to the present. It was there argued by Serjeant *Glynn* that there was a difference between the words “children” and “sons,” the former implying future progeny, the latter not. But the Court were clear, upon the authority of *Wylde’s* case, and that in *Anderson*, and *Sonday’s* case, that John Wharton (who at the time of the devise had no issue) took an estate tail under a devise “to J. W. and to his sons in tail male, and in failure of such issue then over.” Now in that case there was some reason to suppose that the testator intended to give an estate tail to the sons as purchasers: but the Court thought that the words “in failure of such issue” were not to be restrained to the sons, but must include all the male posterity of J. W. who must therefore take an estate tail. The doctrine laid down in the famous case of *Robinson v. Robinson*,‡ as well as the words of the devise, bear strongly on the present question. Notwithstanding the devise was expressly limited to Launcelot Hicks for life, yet as it appeared that the testator by the words “such son as he should have,” meant to embrace all his male issue, the Court of King’s Bench held that L. H. took an estate tail. It is true that there *was some difference of opinion respecting the decision of that case; but when carried into error the judgment of the King’s Bench received the final approbation of the House of Lords. So in *Roe d. Dodson v. Grew*,§ where the devise was to George Grew for life, and after his decease to the issue male of his body, he having no issue at the time when the will was made, George Grew was held to take an estate tail. The only other case which I shall mention is *Hodges v. Middleton*.|| There the devise was to Mrs. Ann Middleton for life, and at her death to her children. Now it appears from the case that Mrs. Middleton had seven children at the death of the testatrix, and it is singular enough that Serjeant *Hill* in arguing for the plaintiff observes, that as the date of the will was only one year previous to the death of the testatrix, probably there were children of

† 2 Bl. 1083.

‡ 1 Burr. 38.

§ 2 Wils. 322.

|| Dougl. 431.

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Mrs. M. *in esse* at the date of the will. Now if there were children *in esse* at the date of the will, and that there were appears pretty clear, that case is particularly strong, for the Judges certified that they were inclined to think that under the will Mrs. M. took an estate tail.† On the part of the defendants it has been contended, that admitting the general doctrine that a devise to a man and his children, he having no children at the time of the devise, must embrace all the posterity of the devisee, yet that it appears from the circumstances of this particular case that the testator did not intend so to limit his estate: and in the course of the argument the power given to John Seale to settle the estate on such of his children as he should think proper was mainly relied upon, and contended to be inconsistent with a devise of an estate tail to John Seale himself. It was urged that the power would be altogether unnecessary if an estate tail were already given, since it would be in the power of the tenant in tail to dispose of the whole estate in such manner as he should think fit, by cutting off the entail. But it may be observed that the power had some operation, since it enabled the devisee to dispose of the estate to his children without going through the forms of a recovery. Independent however of the operation of this power, I think there is a fallacy in the argument: for it supposes that the testator knew the legal *consequences of all the words which he had used, and all the privileges attached to a tenancy in tail. The same argument was urged in the great case of *Perryn v. Blake*‡; and in the Exchequer Chamber Mr. Baron PERROT exposed the fallacy of it: and it was agreed that a testator cannot be presumed to know the different privileges annexed to the several estates of tenant for life or tenant in tail.

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† Lord Chief Justice WILLES in delivering the judgment of the Court in *Ginger d. White v. White*, Willes, 353 (in which case most of the authorities cited in the present case are commented upon), makes this observation on *Wylde's* case: "If a devise be to A. and his children, if there be no children then in being it gives an estate tail, because the devise is in words *de*

presenti, and there being no children they must take by way of limitation, but if a devise be to A. and after his decease to his children, A. has only an estate for life, because then the words plainly shew that the children were intended to take by way of remainders." With this latter position, the opinion of the Court in *Hodges v. Middleton* seems inconsistent.

‡ 4 Burr. 2579.

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The true question to be considered is, whether the testator meant to give the estate to John Seale and his posterity? Probably if it had been asked of the testator whether he meant that his son should have a power to defeat the limitation, he would have answered, that he did not understand the effect of an estate tail, but that he wished the estate to go to his son and his posterity. If he meant to give his estate to his son and his posterity generally, it is an estate tail; on the other hand, if he meant to give it first to his son, and afterwards to select the sons and daughters of his son in order to give the estate to them, the son took only an estate for life. Now we are of opinion upon all the authorities, that the words "children lawfully to be begotten," in this case, are not to be considered as words of purchase, but that the intention of the testator was to give his estate to his son and the issue of his body generally. And though perhaps the power would not have been added had the testator known the full effect of the words which he has used, yet we do not think the power sufficient to control the effect which, according to the authorities referred to, has always been given to those words. We give no opinion what would have been the case if there had been children born at the time of the devise. We shall make a certificate to the Lord Chancellor, that John Seale under the codicil took an estate tail, with a power of appointment annexed.

Accordingly the following certificate was afterwards sent to the Lord Chancellor :

"We have heard the arguments of counsel upon this case, and are of opinion that under the codicil John Seale the son took an estate tail in the testator's real estates, with a power by deed or by his last will to settle the said estates, or any part thereof, upon all or any of his issue, for such estates and interests as he should thereby appoint, and thereby to determine the estate tail devised to him by the testator, so far as the same should be inconsistent with such settlement.

"ALVANLEY. "G. ROOKE.
"J. HEATH. "A. CHAMBER."

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If an Act of Parliament for enclosing and allotting the common and waste lands of a parish through which a navigable river flows, empower commissioners to set out such public and private roads and ways as they shall think necessary, and direct that all roads and ways not so set out shall be deemed part of the lands to be allotted; an ancient towing path upon the bank of the river though not set out by the commissioners, still subsists, for it is not within their jurisdiction.

TRESPASS for taking and impounding the plaintiff's horse drawing certain boats at Northwold in the county of Norfolk. Plea that a certain close called Arminghay Hill (the *locus in quo*) was the freehold of the defendant, and that the horse was there taken damage feasant. Replication, that the said close from time whereof, &c. hath lain open and adjoining to a certain river called the Wissey, the said river being a navigable river between Stoke and Hilgay, and that the owners of boats, &c. navigating the same have been accustomed to pass and repass in, through, and over the said close with their horses, &c. for the purpose of haling and towing the said boats along the said river. Wherefore the plaintiff entered the said close with the said horse for the purpose of haling and towing the said boats for the more convenient navigation of the said river; when defendant of his own wrong took the horse. Rejoinder, taking issue on the right of way. Verdict for the plaintiff, with 40s. damages, subject to be reduced to one shilling if the Court should be of opinion with the defendant on the following case:

The defendant is the occupier and owner of the close mentioned in the pleadings, lying in the parish of Northwold on the north bank of the river Wissey, which is a navigable river from Stoke in Norfolk to Hilgay in the same county. On the south side of the river opposite to Northwold there is a regular towing-path: but for the convenient navigation of the river, it is frequently necessary to change the horses from one side of the river to the other. The owners of boats and vessels navigating the said river have time immemorial been accustomed to pass and repass in, through, and over the said close in question with their horses for the purpose of haling their said boats and vessels

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along the said river, which they had constantly done without interruption, whenever necessity or convenience required; and without such occasional towing or haling it would be impossible to navigate the same. By an Act of Parliament passed in the year 1796 for inclosing and allotting the commons and waste lands of the parish of Northwold, the commissioners therein named are directed to set out and appoint such public and private roads and ways, and to order and direct such *bridges, ditches, banks, wiles, gates, bars, inlets, drains, water-courses, and other works, as they shall think necessary and proper; and it is enacted, that when the said public roads and ways shall be so set out, appointed, and made, it shall not be lawful for any person or persons to use any other roads or ways, either public or private, within or upon the lands thereby directed to be divided and allotted, on foot, or with horses, cattle, or carriages; and that all roads and ways which shall not be so set out and appointed as the roads or ways within or upon the lands thereby directed to be divided and allotted, shall be deemed to be part of the lands and grounds thereby directed to be divided and allotted, and shall be divided and allotted accordingly. The said Act provides, that the said commissioners shall, before the setting out any roads or highways in pursuance of the Act, cause a notice of their intention, and a description of all the public ways and roads intended to be set out and appointed by them, to be affixed upon the principal door of the parish church of Northwold, and to be inserted in a Norfolk newspaper twenty-one days at least before such roads or highways should be set out; and if any person or persons should have any objection to the said roads or highways, or any of them, or should propose any other roads or highways, such person or persons should deliver their objections or proposals in writing to the said commissioners at the times therein mentioned, and that the said commissioners should thereupon hear the allegations and evidence offered and produced to them in support of the said objections or proposals; and after due consideration thereof, should set out and appoint all or any part of the public roads or highways described in the said notice, or such other public highways or roads in lieu thereof as they should think fit. The

commissioners did set out and appoint certain public and private roads accordingly, which roads were made and completed ; and before the setting out of the said roads, the notice required by the Act was duly given, and the other directions of the Act complied with on the part of the commissioners. No road was set out, in, or over the said close, and no person attended at any meeting of the said commissioners to prove a right, or to assert a claim to the road in question. The close over which this road is claimed was, before and until the passing of the Act of Parliament, part of the commons or waste land of the said parish of Northwold, and was inclosed and allotted by the commissioners under the said Act to the Reverend Richard Whish, *an owner of lands and commonable messuages within the said parish, and was before the time, in the declaration mentioned, sold by him for a valuable consideration to the defendant. The plaintiff's horse at the time he was taken by the defendant was in the said close, and employed in haling the plaintiff's barges on the said river Wissey.

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Sellon, Serjt., was to have argued in support of the verdict ;

But *Praed*, Serjt. for the defendant being called upon by the Court, contended, that the object of the Act of Parliament being to discharge the land to be divided from all unnecessary burthens, this towing-path, which at the time of the passing of the Act was an existing public way, not having been set out and appointed by the commissioners as such, must now be taken to have been deemed unnecessary by them, and ought therefore to be considered as part of the lands divided ; that this argument was strengthened by the circumstance stated in the case, of the existence of a towing-path on the other side of the river ; and that although arguments of inconvenience might have weight in a case where the words of an Act of Parliament were doubtful, yet that in the present, where the directions of the Act were positive, such arguments could not prevail.

LORD ALVANLEY, Ch. J. :

I think there is no difficulty in the construction of this Act of

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Parliament. This Act authorises certain commissioners to enclose certain lands, and to set out such ways as they should deem necessary, and to shut up such as they should deem unnecessary. Before the passing of this Act there was a navigable river bounded on the south by enclosed lands, over which there was a towing-path, and on the north by unenclosed lands, over which the public had also been accustomed to pass for the purpose of towing. The Commissioners have set out no towing-path. Now it appears to me that the reason of this omission must have been, that they did not consider the matter to be within their jurisdiction. It was not the intention of the Legislature to empower the commissioners to shut up one public road without setting out another in lieu of it. In cases of roads it may be very easy to substitute one for another; and the commissioners have done so in the present instance: but a towing-path can exist no where but upon the bank of the river. It would therefore be monstrous to hold the public precluded from their right to pass along the north bank of this river, when it neither appears to have been the intention of the Legislature to empower the commissioners to interfere *with that right, nor do the commissioners themselves appear to have had the towing-path in their contemplation when they proceeded to make their allotment.

HEATH, J. :

This power of shutting up ways was given to the commissioners, in order to prevent the waste of ground arising from a multiplicity of roads, for it never was intended to include the towing-path in that general power; and even if it had been included, the commissioners must have set out some other towing-path in lieu of that which was taken away.

ROOKE, J. :

This Act contains the usual saving of the King's rights. If therefore the commissioners have set out no other towing-path in lieu of that which before existed, I should hold that the right of navigating this river, and of towing barges upon it, must still be reserved to the King. If one road be set out for another the

public is not injured : but if the towing-path be taken away the public is thereby deprived of the power of navigating the river. Supposing therefore that the towing-path could be considered as falling within the words of the Act, I should still be inclined to hold, that the right was saved by the exception in favour of the King, who is the protector of all these public rights.

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CHAMBRE, J. :

I think that conclusions from Acts of Parliament against the rights either of the public or of individuals ought not to be enforced by too strict an adherence to the letter. In my view of the case, it was not the intention of the Legislature to give any jurisdiction to the commissioners respecting any rights of way which form part of the navigation of the river. The ways intended to be included were ways in the popular sense of the word, leading from one vill to another. But this towing-path is only a part of that way which consists of the whole navigation of the river. The commissioners have so considered it, and I think they have put the right construction upon the Act.

Per CURIAM :

Let the verdict stand.

THE KING v. EGGINTON AND OTHERS.†

(2 Leach Cr. C. 913—923, Case 325; S. C. 2 Bos. & P. 508—514.)

Burglary cannot be committed in a centre building used merely as a partnership counting-house, but having no internal communication with the dwelling-houses which formed the wings. The assent of a prosecutor, to give facility to the commission of a larceny, for the purpose of detecting the offenders, does not do away with the felony, although the property was not taken against his will.

At the Lent Assizes for the county of Stafford, 1801, John Egginton, Walter Egginton, Thomas Gibbons, John Foulds and William Foulds, were tried before Mr. Justice Lawrence for a burglary.

The indictment contained eight counts. The first count charged them with breaking and entering the dwelling-house of

† *R. v. Middleton* (1873) L. R. 2 C. C. R. 38, 61; 42 L. J. M. C. 73; 28 L. T. 777.

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EGGINTON. Mathew Robinson Boulton, and stealing therein a quantity of silver goods and one hundred and fifty guineas, which were laid to be the property of Mathew Boulton and John Hodges; one hundred and fifty guineas the property of Mathew Boulton, Mathew Robinson Boulton, James Watt, and Gregory Watt; one hundred and fifty guineas the property of Mathew Boulton, John Bonus, and William Nelson; one hundred and fifty guineas the property of Mathew Boulton, Benjamin Smith and James Smith; and one hundred and fifty guineas the property of Mathew Boulton, John Hodges, Mathew Robinson Boulton, James Watt, Gregory Watt, John Bonus, William Nelson, Benjamin Smith and James Smith. The second and third counts, laid the place in which the burglary was *charged to have been committed, to be respectively the dwelling-house of John Bush, and of William Nelson. The fourth count charged the prisoners with stealing the property in the dwelling-house of the said Mathew Robinson Boulton, and burglariously breaking the house to get out of it against the statute. The fifth count was the same as the fourth, only laying it to be the dwelling-house of John Bush. The sixth count was for stealing the property in an out-house, belonging to the dwelling-house of the said Mathew Boulton against the statute. And the seventh and eighth counts were the same as the sixth, only laying the out-house as respectively belonging to Mathew Robinson Boulton and William Nelson.

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It appeared in evidence on the trial that the silver goods were the property of Mathew Boulton and John Hodges; that the hundred and fifty guineas were the property of Mathew Robinson Boulton and William Nelson, with whom Mathew Boulton was concerned in different manufactories, that is to say, with John Hodges as manufacturers of plated goods; with William Nelson and John Bonus as button-makers; with James Smith and Benjamin Smith as buckle-makers; with Mathew Robinson Boulton, James Watt, and Gregory Watt as engine-makers; and that, besides these, Mathew Boulton carried on two other manufactories on his own sole account. It further appeared that the money and part of the silver articles were kept in a counting-house, which was used for transacting the money concerns, and keeping the accounts of all the different businesses in which

Mathew Boulton was engaged; that other part of the silver was in a room, being one of several, where the plate business was carried on, which rooms and counting-house formed a centre building, having two wings adjoining, consisting of dwelling-houses inhabited by persons engaged in Mathew Boulton's manufactories; that one of them was inhabited by Mathew Robinson Boulton, but that had no internal communication with the centre building: At the time of the offence being committed, a room in his house, which communicated with the centre building, having been allotted to the purposes of the plating business with which he had *nothing to do, the door into it was shut up and a working bench placed against it, so as to stop up the passage; that a person of the name of Bush, a workman of Mathew Boulton, occupied another of the dwelling-houses in the same wing, from which house there was no way into the centre building, but that there was a window in it which looked into a passage, which ran the whole length of the centre building; that in the other wing is the dwelling-house of William Nelson the partner of Mathew Boulton in the button business, which has no internal communication with the centre building, and in that wing other persons live. That in the front of this building there is a terrace or front yard fenced round in different ways, and at the end of the pile of buildings above described, there is a wall with gates for horses and carriages, and a door for foot passengers. It further appeared that the prisoners had, some time previous to the breaking into the centre building, applied to one Joseph Phillips, who was employed as watchman to the manufactory at Soho, to assist them in robbing it, to which he assented in the first instance, but immediately afterwards informed first some of Mathew Boulton's servants and assistants, and afterwards Mathew Boulton himself, telling him what was intended, and the manner and time the prisoners were to come; namely that they were to go into the counting-house, and that he was to open the door into the front yard for them, that Mathew Boulton told him, in return, to carry on the business; and that he Boulton would bear him harmless; that Mathew Boulton also consented to his opening the door leading to the front yard, and to his being with the prisoners the whole time. In consequence

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of this information Mathew Boulton removed from the counting-house every thing but one hundred and fifty guineas and some silver ingots, which he marked for the purpose of furnishing evidence against the prisoners, and lay in wait to take them when they should have accomplished their purpose: that on the 23rd December about one o'clock in the morning the prisoners came, and Phillips opened the door into the front yard through which they went along the front of the building, and round into another yard behind it called The Middle Yard, and from *thence they and Phillips the watchman went through a door which was left open, up a staircase in the centre building leading to the counting-house, and to the rooms where the plating business was carried on: this door the prisoners bolted, and then broke open the counting-house which was locked, and the desks which were also locked, and took from thence the ingots of silver and guineas. They then went to the story above into a room where the plating business was also carried on, and broke the door open, and took from thence a quantity of silver, and returned down stairs, when William Foulds unbolted the door at the bottom of the stairs which had been bolted on their going in, and went into the middle yard, when all (except William Foulds who escaped,†) were taken by the persons placed to watch them.

On this case two points were made for the prisoners.

First: That no felony was proved, as the whole was done with the knowledge and assent of Mathew Boulton, and that the acts of Phillips the watchman were his acts.

Secondly: That if the facts proved amounted to a felony, it was but simple larceny, as the building broke into was not the dwelling-house of any of the persons whose house it was charged to be; and that there was no breaking, the door being left open.

The jury found the prisoners guilty; but the learned Judge reserved the objections for the opinion of the Twelve Judges.

On Saturday 9th May, 1801, the case was argued in the

† He was apprehended subsequently to the conviction of his associates, and tried at the Spring Assizes at Stafford, 1801, before Mr. Justice

Lawrence, found guilty of the larceny and transported. 2 Bos. & P. Rep. 514.

Exchequer Chamber by *Clifford* for the prisoners, and by *Manley* for the Crown.

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Clifford for the prisoners argued the second point first.

* * * As to the other point, the whole criminality is done away by the consent and assistance which Mathew Boulton gave to the perpetration of the offence. It is of the essence of every offence against the property of another that it should be committed against the will of the owner. *Bracton* says, “*Contractatio rei alienæ fraudulenta cum animo furandi invito illo domino cujus res illa fuerit.*” It is taken for granted in *Donally’s* case,[†] that robbery must be against the will of the owner; and *WILLES*, Justice, in delivering the opinion of the Judges, says that “Wherever one man obtains property from the possession of another against his will, the law presumes the act to proceed from a felonious intention.” The consent of Mr. Boulton was the consent of all concerned, and the watchman was the mere instrument of his will. Boulton, in any other case than his own, would, under such circumstances, and by a conduct similar to the present, have made himself an accessory before the fact. In *Macdaniel’s* case; it is laid down as a principle of law not to be controverted, that whoever procures a felony to be done is a felon; if present he is a principal; if absent an accessory before the fact; and the statutes of 4 & 5 Philip & Mary, c. 4, and 3 & 4 Will. & Mary, c. 9, are referred to. “The words of the former,” says the learned writer, “which are descriptive of the offence are, If any person shall maliciously counsel, hire or command; the latter retains the words counsel, hire or command, and adds others, shall comfort, aid, abet or assist;” and Sir Edward Coke says § that under the word “aid” is comprehended all persons assenting and consenting to the act. Now in the present case Mathew Boulton did assent and consent to the whole of this transaction; and if his crime be done away by the circumstance of the property being his own, the same circumstance will do away the crime in the prisoners also. Suppose Phillips the watchman had been indicted for the burglary, what could have

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† 2 Leach Cr. C. 193; 2 East, C. L. 715.

‡ Foster’s C. L. 125.
§ 2 Inst. 182.

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LORD KENYON, Ch. J.:

In *Cornwall's* case the servant acted with a felonious intention against his master's property, but in the present case the watchman was in the faithful discharge of his duty to his master.

Clifford:

The felonious intent cannot make any difference. In the case *Macdaniel, Berry and Egan*,§ all the prisoners were acquitted on account of the robbery having been committed in consequence of a previous agreement. Salmon and others, together with one Thomas Blee, met at the Bell Inn, in Holborn, and agreed that Blee should procure two persons to commit a robbery upon Salmon. Blee did procure Ellis and Kelly, and led them, unknowingly and on pretence of stealing linen at Deptford, to the spot where Salmon had been previously placed, and they robbed him of the goods stated in the indictment; and the Judges were of opinion that, as he had consented to part with his property, no robbery, in consideration of law, was committed on him; for that his property was not taken from him against his will. In the case of *Rex v. Norden*,|| indeed, the assent of the party robbed was held not to take away the felony; but the reason assigned for that is,

† 2 Stra. 88; 10 St. Tr. 433, 38, s. 8 & 9.

Hargrave's edit.

§ Foster, 121; 4 Bl. Com. 230.

‡ See 1 Hale, 553; 2 Hawk. c.

|| Foster's C. L. 128.

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that he was quite uncertain whether the robber would come or not; that there was no concert, no sort of connection between him and the highwayman; nothing to remove or lessen the difficulty or danger he might be exposed to in the adventure. But in the present case the offence possibly could not have been perpetrated if it had not been for the communication that was held with, and the assistance afforded to, the prisoners.

Manley for the Crown.

* * As to the other objection, the essential ingredient in all felonies is the intention with which the act is done. In the definition of theft stated on the other side from Bracton, a material part of it has been omitted. That writer, after saying that theft must be *cum animo furandi*, adds, *cum animo dico, quia sine animo furandi non committitur*. It is therefore falsely assumed that Mathew Boulton stood in a similar situation with Salmon, for he cannot, in any view of his conduct, be considered *particeps criminis*, inasmuch as his consent was only given for the purpose of detecting the prisoners, and the only business to which that consent applied was that which the prisoners themselves had originally contrived and proposed to Phillips to join in executing. Neither the prosecutor nor the watchman did any act to invite or induce the prisoners to commit the offence. *Norden's* case† is, in principle, very like the present. Having been informed that one of the early stage-coaches was intended to be robbed, he put some money and a pistol in his pocket, and accompanied the coach in a chaise with a view to apprehend the robber. On the attack being made he gave the highwayman the money he had about him, and then jumped out of the chaise with his pistol in his hand and secured him; and it was held to be robbery, for that Norden had set out with a laudable intention to use his endeavours for apprehending the highwayman, in case he should that morning come to rob the coach, which, at that time, was uncertain. There is another case of the like kind. A hopdealer was suspected of having robbed an inn at Worcester, the landlord, with a view to detect him, hung up a great-coat in *the yard, with a handkerchief hanging partly out of the pocket, and

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† *Foster's Crown Law*, 128.

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the man, being watched, was detected in the very act of stealing the handkerchief. On his trial before Mr. Baron THOMPSON at the ensuing Worcester Assizes, I took the objection that the landlord had voluntarily suffered the property to be taken, and by this contrivance had induced the prisoner to commit the offence, but the objection was overruled and the prisoner convicted. There is a case in Fitzherbert† which is precisely in point. The servant of an alderman of London agreed with strangers to steal his master's plate, and procured a false key of the place where the plate was kept in the house; but the servant afterwards revealed the design to his master, who, on the appointed night, had men ready to apprehend them; the strangers afterwards came and entered into the said place with intent to steal the plate and were taken, and being tried for the burglary they were found guilty and executed.

The JUDGES were unanimously of opinion that the prisoners were not guilty of the burglary, inasmuch as the centre building, which they had entered and robbed, being a place for carrying on a variety of trades, and having no internal communication with the adjoining houses, could not be considered as part of any dwelling-house;‡ but a majority held that the prisoners were guilty of the larceny; for that although Mathew Boulton had permitted or suffered the meditated offence to be committed, he had not done any thing originally to induce it; that his object being to detect the prisoners, he only gave them a greater facility to commit the larceny than they otherwise might have had; and that this could no more be considered as an assent than if a man, knowing of the intent of thieves to break into his house, were not to secure it with the usual number of bolts; that there was no distinguishing between the degrees of facility a thief might have given to him; that Boulton never meant that the prisoners should take away his property; that the design originated with the prisoners; and that all Boulton did was to prevent their design being carried into undetected execution; which

† Fitz. Justice, p. 31, b.; Crompt. Edit. pl. 10.

‡ The conditions as to the crime

of breaking into, &c., and stealing, are now defined by 24 & 25 Vict. c. 96, ss. 53, 55.—R. C.

differed *the case greatly from what it might have been if he had employed his servant to suggest the perpetration of the offence originally to the prisoners.†

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The prisoners were therefore pardoned, on condition of being transported for seven years.

C. P. MICHAELMAS TERM.

HUNTLEY v. LUSCOMBE.

(2 Bos. & P. 530—540.)

1801.
Nov. 19.

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Service of a demand of a copy of the commitment on the turnkey of a prison is not sufficient to support an action against the gaoler for the penalty incurred by him under the Habeas Corpus Act, for not delivering the copy to the prisoner within due time after the demand made, if the gaoler himself were in the prison.

THIS was an action on the case against the defendant as keeper of the gaol at Portsmouth for not delivering to the plaintiff, who stood committed and detained in his custody, "under and by virtue of a certain warrant or certain warrants of commitment and detainer for a certain supposed criminal matter not being felony or treason," a true copy of the warrant of commitment.

The cause was tried before Thompson, Baron, at the last Spring Assizes at Winchester, when it appeared that the defendant was in custody under a warrant of commitment, granted by two justices in consequence of a return of *nulla bona* to a previous warrant of distress to levy a penalty of 20*l.* recovered against the plaintiff for an offence against the excise laws. The warrant of commitment authorized the officers to whom it was directed "to take and arrest the body of the said H. Huntley (the plaintiff),

† Mr. Justice LAWRENCE doubted whether it could be said to be done *invito domino*, when the owner had directed his servant to carry on the business, and meant that the prisoners should be encouraged by

the presence of that servant: and that by his assistance they should take the goods, so as to make a complete felony; though he did not mean that they should carry them away. 2 East's C. L. 668.

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and forthwith to carry the same to the gaol or prison of and for the borough or place where they should take and arrest the same, and the same together with a duplicate of the warrant there to deliver into the custody of the gaoler or keeper of the said gaol or prison of and for the said borough or place, there to remain in safe custody until she should satisfy and pay the sum of 20*l.* by the said justices adjudged against her on an information exhibited against her by J. P. as well on behalf of His Majesty as of himself for a certain offence committed by the said H. Huntley against the laws and statutes of excise, whereof she stood convicted." At the trial it was proved that one of the persons then in confinement in the prison, on the part of the plaintiff, served the turnkey on the 25th of November with a notice directed to the defendant of a demand of a copy of the warrant, and that on the 27th the turnkey delivered to the plaintiff a copy of the warrant indorsed by the defendant; whereas by the 31 Car. II. c. 2, s. 5, such copy is required to be delivered within six hours after the demand. The defendant was resident in a house, the door of which opened into the prison yard.

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It was objected on behalf of the defendant, in the early part of the trial, that the notice of a demand of a copy having only been served on the turnkey, there was no evidence as to the time at which it came to the defendant's hands. The learned Judge overruled the objection, but said he would reserve it for the defendant's counsel, in case they should be inclined to move the point. Afterwards it was objected that the commitment under which the plaintiff had been detained being only for the non-payment of a penalty, was to be considered as a commitment in execution in a civil matter, in which case the 31 Car. II. c. 2, s. 5, upon which the action was founded would not apply. Upon this point the learned Judge nonsuited the plaintiff, with liberty to move that the nonsuit might be set aside, if this Court should be of a different opinion.

Accordingly a rule *nisi* for that purpose having been obtained in the course of last Easter Term,

Lens, Serjt. shewed cause in Trinity Term last :

Two objections arise in this case, first, that the offence for

which the plaintiff was committed was not a criminal or supposed criminal matter ; and secondly, that she was committed in execution. * * *

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[*Shepherd*, Serjt. having been then heard in support of the rule,]

The Court desired the case might stand over until this Term, saying it was of great importance, and they should probably consult the other Judges upon the point. [534]

Early in this Term Lord ALVANLEY, Ch. J. observed that the 1st objection taken at the trial, which appeared upon the learned Judge's report, had not been spoken to at all, and desired there might be a further argument of the case upon that point.

Accordingly on this day *Williams*, Serjt. on the part of the defendant contended, that as this was an action to recover a penalty, the plaintiff should be strictly held to shew that the defendant had committed the offence on which the penalty attached ; that as the notice of a demand was only served on the turnkey, it did not appear that it ever came to the hands of the defendant, and that it clearly appeared from the conduct of the defendant that he had no intention to withhold a copy of the warrant, since he actually delivered one the next day but one after the demand made.

Best, Serjt. *contra*, insisted that the Habeas Corpus Act was not to be considered as a penal statute, but on the contrary a highly remedial law ; that the provision in question was framed in a different manner from all penal provisions whatsoever, inasmuch as the Legislature in case of the death of the offending party had given a right of action against his executors and administrators ; that the title of the statute demonstrated the intention of the Legislature to make it a remedial law, it being entitled " An Act for the better securing the liberty of the subject, and for prevention of imprisonments beyond the seas ; " and that it therefore required the most liberal construction. He cited the words of the 5th section of the Act, " that if any officer

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or officers, his or their under-officer or officers, under-keeper or under-keepers, or deputy, shall neglect or refuse to make the returns aforesaid (viz. the returns to writs of *habeas corpus*), or to bring the body or bodies of the prisoner or prisoners, according to the command of the said writ, within the times aforesaid, or upon demand made by the prisoner or person in his behalf, shall refuse to deliver, or within the space of six hours after demand shall not deliver to the person so demanding a true copy of the warrant or warrants of commitment and detainer of such prisoner, which he and they are *hereby required to deliver accordingly, all and every the head gaolers and keepers of such prisons and such other person in whose custody the prisoner shall be detained, shall for the first offence forfeit to the prisoner or party grieved the sum of 100*l.*, and for the 2nd offence the sum of 200*l.*, and shall and is hereby made incapable to hold or execute his said office; the said penalties to be recovered by the party grieved, his executors or administrators, against such offender, his executors or administrators." He then argued that it appeared clearly from these words to have been the intention of the Legislature that in case of default by any of the inferior officers, the head gaoler should be responsible, and that this agreed with the general principle of law *respondeat superior*; that the same intention further appeared from comparing the above section of the Act with the 2nd section, which directs "that whensoever any person or persons shall bring any *habeas corpus* directed unto any sheriff or sheriff's gaoler, minister, or other person whatsoever, for any person in his or their custody, and the said writ shall be served on the said officer, or left at the gaol, that the said officer or officers, his or their under-officers, under-keepers or deputies, shall within three days make return of such writ and bring up the body;" for that if the gaoler was subjected to penalties for neglecting to obey a writ of *habeas corpus* left at the gaol, the probable intention of the Legislature was that he should also be liable for neglecting to give a copy of the warrant within six hours after demand made upon the turnkey; and that if this construction were not to prevail, the provisions might be defeated by the principal keeping out of the way.

LORD ALVANLEY, Ch. J. :

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I assent to the argument which has been advanced in favour of the plaintiff, so far as it goes to state that the Habeas Corpus Act is a remedial law ; and that the Judges of every court are bound to enforce its provisions according to their spirit, in such a manner as most effectually to relieve the subject from illegal imprisonment. But though it be a remedial law so far as it respects those persons for whose protection it was framed, it is grievous in its penalties with respect to those persons who neglect the duties thereby imposed upon them. It is remedial *quoad* some persons, but it is penal *quoad* others. It becomes incumbent upon the Court therefore to take care that those who claim the benefit of this Act have used due diligence on their own part, and that they *avail themselves of the provisions of the Act for the real purpose of obtaining the rights intended to be secured to them. Though we are bound to look with jealous eyes at all those who may be suspected of having wilfully infringed the provisions of this Act, we must still take care that no person makes use of so remedial a law for the purpose of loading with penalties those who, if they had had notice, would not have disobeyed its directions. If a prisoner therefore be desirous of availing himself of that part of the statute which inflicts a penalty on the gaoler for neglecting to comply with his demand of a copy of his warrant of commitment, he must so conduct himself that there may be no reason to suspect that the object of his demand was not a copy of the warrant, but an opportunity to bring an action. The question then in this case is, on whom ought the service of the demand to have been made ? I admit that it is sufficient if the service be made upon the person who has the custody of the prisoner ; and that if the principal be not present and accessible to the prisoner, that service on the deputy who at that time has the custody of the prisoner will make the principal answerable. But in construing the words, " officer or officers, his or their under-officer or under-officers, under-keeper or under-keepers, or deputy," may we not understand them to relate to the principal in the first place, and if he be not present then to any other person who in his absence shall have the custody of the gaol ? Can we suppose

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that they were intended to extend to every porter at the gates of the prison? Or can we say that a turnkey is an under-keeper within the true meaning of the expressions; it being stated that the gaoler was at that time in the gaol, and therefore accessible to all the prisoners? The case then stands thus. A prisoner about six o'clock in the evening puts into the hands of an ignorant turnkey notice of a demand of a copy of the warrant, directed to the gaoler; the turnkey is not called as a witness; it does not appear that the nature or exigency of the demand was explained to him, possibly he could not read, and if he could, the notice does not express the exigency of the demand, and the turnkey was not at the time the keeper, the under-keeper, or the deputy, since the principal was amenable to the notice. But was the notice put into the hands of the turnkey for the purpose of obtaining that which was the object of the demand? It does not appear ostensible that the plaintiff made any inquiry, or took any pains that the notice should come to the hands of the defendant; yet there was a *door to the defendant's house which opened into the yard of the prison, and if it had been intended by the plaintiff that the demand should be literally complied with by a delivery of a copy of the warrant by 12 o'clock at night, is it to be conceived that he would have been so remiss? If indeed he had been informed at the door that the defendant was not accessible, leaving a notice at the door might have been sufficient: for the gaoler is bound to have some person to answer for him: but I cannot think that this service upon a common turnkey is such a reasonable and proper service as to entitle the plaintiff to maintain an action which seeks to recover a heavy penalty denounced by the Legislature against persons wilfully neglecting their duty, in order to facilitate the delivery of prisoners from illegal imprisonment. He who seeks a remedy must do his part: and if it appear to the Court that his object is not a copy of the warrant, but an action; or if by his conduct he has brought the defendant into a situation in which he would not have been placed had he had reasonable notice, I cannot think that the efficacy of the statute will be done away, by holding that the plaintiff has not entitled himself to maintain an action for the penalty against a person with whom he has so

dealt. Without therefore entering into any discussion upon the former point, I am of opinion that the nonsuit was right.

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HEATH, J.:

I entirely concur in opinion with my Lord; but as this is a matter of consequence, and respects an Act which is deservedly popular, I shall deliver my opinion the more at large. In the first place, therefore, though I admit that this is a remedial statute, (and if I know my own heart, I should be the last person to concur in any decision tending to weaken this Act, which was made to secure the liberty of the subject,) yet I consider it as penal with respect to this defendant. We must therefore take particular care that its provisions are not perverted to purposes of iniquity and oppression. The governor of the gaol being present, I think it was necessary that the plaintiff or some person on his behalf should have made a demand on him; or should at least have demanded access to him. It does not appear but that if any person had desired to see the governor, he might have done so. Instead of this a notice is put into the hands of the turnkey, without any explanation of its contents; the governor being at that time in the gaol. I agree that the second and fifth sections of the Act must receive the same interpretation. The reasonable construction is, that *if the governor be present there is then no deputy or under-keeper on whom the service can be made; but if the governor be not present then the deputy may be served; and if the deputy have no deputy, then in the absence of the deputy service may be made on the turnkey, or may be left at the gaol, for it is the duty of the governor to leave some person in his place. The rule *respondeat superior* only applies where the superior is absent. This being the case, according to my apprehension of the second and fifth sections of the Act, the service of the notice was not sufficient. I am therefore of opinion that the action in this case is not maintainable, especially as there is reason to believe that this service of the notice was only intended as a snare to entrap the defendant.

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ROOKE, J.:

I should be as unwilling as any man to concur in any thing

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injurious to the rights of the subject. The *habeas corpus* is a very wise and beneficial statute: and the Judges have always been disposed to put such a construction upon it as will favour the real liberty of the subject. But we must be careful that those Acts which have been made for the benefit of the subject, are not turned into engines of oppression: nor must we, under the idea of promoting general liberty, withhold that degree of favour from individuals which is consistent with the security of the public. It appears to me therefore that gaolers are entitled to all the protection which the law can afford them consistently with the liberty of the subject. By the fifth section of the Act it is provided, that if any officer, his under-officers, under-keepers, or deputy, shall neglect or refuse to make return to a writ of *habeas corpus*, or bring up the body, as directed by the second section, or upon demand made shall refuse or neglect to deliver within six hours a copy of the warrant of commitment, the head-gaolers and keepers, and such other persons in whose custody the prisoner shall be detained, shall be liable to a penalty. Now I think the true construction of this latter part of the Act is, that if the gaoler be within the gaol and accessible, the demand must be made on him; but if he be not accessible it may be made on the deputy. At any rate, however, the demand should have been served in such a way that the person to whom it was delivered should understand its nature, and some pains should have been taken that it should come to the hands of the principal. On this view of the statute, and of the circumstances of this case, I can neither reconcile it to justice nor to a love of liberty to hold that

[*539] *the defendant in this action is liable to the penalty. Such a doctrine would be founded on no principle but that of oppression. In this case I suspect that the notice was delivered for the express purpose of founding an action; and if it be possible that the provisions of the statute should be so perverted, it is our duty to take care that such a perversion should be prevented.

CHAMBRE, J. :

I entirely concur with the rest of the Court in the construction which has been put upon this statute, and I have little to add to what has already been said. There is no doubt that this Act is

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to be considered as a remedial Act, and indeed the most highly remedial Act which stands upon the statute book. But the most remedial Act may contain penal clauses; and if the argument which has been urged on the part of the plaintiff were sound, this Act would be most oppressive in its consequences; since it might subject a person to heavy penalties, and perhaps to an incapacity to hold his office, though he might be as innocent as any man living. It is true that the disability to hold the office is not incurred upon the first conviction; but the first conviction is one step towards it, and if a person may innocently become liable to a first conviction, he may in the same manner become liable to a second. This statute therefore is highly penal in these respects. At the same time we must not fritter away the salutary provisions of the Act by too liberal a construction. The words of the statute "officer or officers, his or their under-officer or under-officers, under-keeper or under-keepers, or deputy," are all descriptive of the persons having the actual custody of the prisoner at the time, and if there were any doubt upon this point, I think that the conclusion of the clause which subjects "the head-gaolers and keepers of such prisons, and such other person in whose custody the prisoner shall be detained," to the penalties, would operate strongly to explain that doubt. Whatever the views of the plaintiff may have been in bringing this action, she has certainly not proved her case as satisfactorily as she might have done; she has been remiss in not calling the turnkey to shew at what *time the notice came to the hands of the defendant. Service on a turnkey may be good for many purposes, but we must look to the nature of the present demand in order to decide whether it be good or not in this particular case. It is the duty of a turnkey to take care of the door; could he therefore have complied with this demand? If then the demand never came to the hands of the principal, where is the justice and where is the advantage to the public in subjecting him to the penalty for non-compliance with the demand? Upon the whole, I am perfectly satisfied with the construction which has been put upon this Act of Parliament.

[*540]

Rule discharged.

1801.
Nov. 26.

DOWSE GENT. DEMANDANT, LLOYD TENANT, AND
REEVE VOUCHER.

[578]

(2 Bos. & P. 578—581.)

Writ of entry and subsequent proceedings in a recovery amended by inserting the words "all and all manner of tithes whatsoever, yearly arising, &c. from and out of the said premises," on an affidavit setting out the vouchee's title to the tithes, and stating his intention to have passed all his interest in the premises; the word "hereditaments" being contained in the deed to lead the uses.

[*579]

BAYLEY, Serjt. moved on the part of the vouchee, to amend the writ of entry and subsequent proceedings in a recovery suffered in Michaelmas Term, 39 Geo. III. by inserting the words "and all and all manner of tithes whatsoever *arising growing or renewing from and out of the said premises." It appeared by the affidavit of the demandant that the grandfather of the vouchee by his will, dated the 14th of October, 1785, gave and devised all and every his freehold manors, messuages, farms, lands, tenements, and hereditaments, situate in the counties of Suffolk, Kent, Berks, or elsewhere within the kingdom of Great Britain, thereinbefore undevise, to the use of his grandson J. P. Reeve and the heirs of his body; that the said J. P. Reeve by bargain and sale, dated the 26th day of November, 1798, for the purpose of making a tenant to the *precipe*, conveyed to J. Lloyd all that farm called Greyberry's Farm, with the several closes, pieces, and parcels of arable, meadow, pasture, and wood land thereto belonging, containing, &c. situate in the parish of Eton Bridge, in the county of Kent, and all other the manors, messuages, lands, tenements, and hereditaments of him the said J. P. Reeve, and which were theretofore the estate and inheritance of J. Plumsted, late of &c. situate in the several parishes thereinbefore mentioned, together with all rights, privileges, advantages, hereditaments, and appurtenances belonging or appertaining or to or with the same then or at any time theretofore held, used, occupied, possessed, or enjoyed, or accepted, reputed, deemed, taken, or known as part, parcel, or member thereof, or as belonging thereunto respectively; and all the estate, right, title, interest, use, trust,

possession, property, claim, and demand whatsoever of him the said J. P. Reeve, of, in, to, or out of the premises, to hold to the said J. Lloyd, his heirs and assigns, for the purpose of enabling him to suffer a recovery to enure to the use of the said J. P. Reeve, his heirs and assigns; that a recovery was accordingly suffered of lands in Eton Bridge, but that in the said recovery no mention was made of tithes, the demandant, who was concerned as attorney for J. P. Reeve the vouchee, not being apprised that the said J. P. Reeve was entitled to the tithes of the estate, but that he had since discovered that J. Plumsted was seised of the tithes of the estate, and that the same passed by his will to the said J. P. Reeve the vouchee. The affidavit further stated that it was the intention of the said J. P. Reeve and of the demandant, that the said bargain and sale and recovery should comprise all the estate and interest of the said J. P. Reeve, in the parish of Eton *Bridge, which had passed to him by the will of the said J. Plumsted the testator.

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[*580]

Bayley, Serjt. relied on a case of *Milbanke v. Jolliffe*, decided in the Court of Pleas at Durham, 23rd July, 1772, with the concurrence of the late Mr. Justice GOULD and Mr. Justice WILLES, who were consulted upon it.

The COURT, after some hesitation on the part of Lord ALVANLEY, Ch. J. allowed the amendment.

[581]

Note.—Though the proceedings in question in this case are obsolete, the principle is still applicable to a disentailing assurance under the modern system. It is not, however, intended to retain in the Revised Reports all the cases of the kind which appear in the Common Pleas Reports of this period. They will be found collected in Saunders' Reports, 94 *a*, and are referred to generally in the important case of *Hall-Dare v. Hall-Dare* (C. A. 1885) 31 Ch. D. 251; 55 L. J. Ch. 154; 54 L. T. 120, which established the principle that the Court of Chancery had jurisdiction notwithstanding sec. 47 of the Fines & Recoveries Act (3 & 4 W. IV. c. 74), to rectify a deed enrolled as a disentailing assurance under the Act.—R. C.

EXCH. MICHAELMAS TERM.

DAVIS *v.* WITTS.

(Forrest's Exch. Rep. 14—18.)

1800.
Nov. 21.

[14]

A pew in the aisle of a church may be prescribed for as appurtenant to a house out of the parish. *Qu.* as to a pew in the body of the church?

THIS was an action on the case, for disturbing the plaintiff in his pew. The declaration consisted of several counts: the first stated, that the plaintiff was possessed of a house in the parish of Hawkesbury, in the county of Glo'ster, and by reason thereof, "was entitled to a pew on the south side, and adjoining to the middle aisle of and in a certain chapel of ease, situate at Tresham, in the said parish of Hawkesbury." The second count stated the house to be in the parish of Kingswood, in the county of Wilts, and the chapel in Tresham, in the parish of Hawkesbury. There were several more counts, stating it in different ways.

The cause was tried at the last Glo'ster assizes, before Heath, J. when it was proved, that the plaintiff's house was in the parish of Kingswood, and the chapel in which the pew was claimed, was in Hawkesbury. That the plaintiff, his father, and grandfather had used it; and that they repaired it thirty years ago. Upon this evidence, a verdict was found for the plaintiff, with leave for the defendant to move to set it aside, and enter a nonsuit, on the ground that the plaintiff could not prescribe for a pew in one parish, as attached to a house situated in another.

Leycester having obtained a rule *nisi* for that purpose, on the authority of Co. Litt. 121 b, and *Brabin v. Tratam*, Pop. 140,

Plumer and *Dauncey* now shewed cause against it:

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It is clearly established, that the plaintiff had immemorially enjoyed the possession of the pew; uniform enjoyment is therefore with us. It is also established, that the plaintiff repaired; therefore prescription is also with us. The case cited from *Popham*, and the passage from Co. Litt. are not applicable, as they only prove that a pew cannot be granted to one and his heirs, or in respect of land. Those are cases where the pew is

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not annexed to any house at all, when the ordinary could not grant it. The question here is, Whether the plaintiff can claim the pew in respect of a house close adjoining to, though not in the parish where the chapel is situated? Suppose the plaintiff's house had once been included in the parish, and that the parochial division had been altered, would not he be entitled to a pew? Or suppose the plaintiff had endowed the chapel, reserving a seat for himself; in that case he would be clearly entitled. But granting this might be an objection as between the plaintiff and the ordinary, this is a question between the plaintiff and a wrong doer, against whom the possession is a sufficient ground of action, and it need not be alleged that he repaired: 1 Gibson's Codex, 222, (folio edition) and *Kenrick v. Taylor*, 1 Wilson, 326. A person inhabiting one parish, may prescribe for a pew in the aisle of a church in another parish; *Buxton v. Bateman*, 1 Siderf. 88; which case is referred to in *Barrow v. Kew*, 2 Keble, 942, where the Court thought that a prescription for a seat, by an inhabitant of another parish, was ill, "unless he prescribed for the aisle, or *pro sedile*, or shew that *he used to repair; but after verdict, these are intended, and are necessary evidence." Hence it appears, that a seat in the aisle may be prescribed for by an inhabitant of another parish, without alleging repairs; but if he shews a custom to repair, he may prescribe for a seat in any part of the church: here the plaintiff has alleged a custom to repair, which, after verdict, must be taken to have been proved. But it is not necessary in this case to go so far, for this pew must be considered to be in the aisle; the words in the declaration are, "On the south side, and adjoining to the middle aisle." Originally the aisle meant the wing of the church; but now that is, in common parlance, called the aisle which lies between the enclosed part of the church and the wing; the place adjoining to the middle aisle, must therefore signify the wing.

[*16]

Leycester, in support of the rule :

This case, I admit, is to be considered as if the plaintiff had proved a custom to repair: but I contend, that is not sufficient to entitle a person residing out of the parish, to a pew in the

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[*17]

parish church. The pew is described in the declaration, to be "on the south side, and adjoining to the middle aisle;" and therefore it cannot be said to be in the aisle. The place adjoining to the aisle, must be understood to mean the body of the church: there is a distinction made between the aisle and the body of the church; the reason given for which is, because it may happen that an individual has built the aisle for his own convenience, but that the body of the church is *reserved for the use of the parishioners: the distinction is taken in 12 Co. Rep. 105 (*Corven's case*), and in Gibson's Codex, 221, 2; therefore a person, not a parishioner, cannot be entitled to a seat in the body of the church. But upon the supposition that this pew is in the aisle, yet the plaintiff cannot set up a prescription to it as appurtenant to a messuage out of the parish. A bare possession is not sufficient, even against a wrong-doer; the plaintiff must prove a right, either by prescription or by faculty, and that right must be stated in the declaration as appurtenant to a messuage in the parish. *Stocks v. Booth*, 1 Term Rep. 428.† There is no faculty attempted to be set up in this case; therefore it rests entirely upon the prescription. The inhabitants of the parish are the only persons who have an exclusive right to sit in the church. In 3 Inst. 202, it is said, that "albeit the freehold of the church be in the parson, yet if a lord of a manor, or any other that hath a house within the town or parish, and that he and all those whose estate he hath in the mansion of the manor, or other house, hath had a seat in an aisle of the church for him and his family only, and have repaired it at his proper charges, it shall be intended that some of his ancestors, or of the parties whose estate he hath, did build and erect that aisle for him and his family only." Hence it appears, that a prescription for a seat, even in the aisle of the church, must be in respect of a house within the parish. The reason given why a pew cannot be granted to a man and his heirs is, that the seat doth not belong to the *person, but to the house; for "otherwise, when the person goes out of the town, to dwell in another place, yet he shall retain the seat, which is no reason;" Pop. 140, 12 Coke Rep. 105: which plainly shews

[*18]

† 1 R. R. 244.

that a person dwelling in another parish, could not prescribe for a seat. The case of *Buxton v. Bateman*, 1 Sid. 88, does not decide the present; that being a case where a pew was claimed in respect of a house in the same parish. The case of *Barrow v. Keene*, is very inaccurately reported in 2 Keble: in 1 Sid. 361, the same case seems to be more correctly stated; where it is said, "perhaps one may have a prescription for a seat in the aisle." In Burn's Eccles. Law, tit. Church, it is said, That the ordinary cannot give a faculty to a person not residing in the parish: *a fortiori* therefore such a person cannot prescribe.

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As it did not appear from the Judges' report, Whether the pew was in the aisle, or in the body of the church? the Court directed that fact to be ascertained; and, on a subsequent day, the pew appearing to be situated in the aisle,

The Court discharged the rule.

THE KING v. CALDWELL AND OTHERS.

(Forrest's Exch. Rep. 57—61.)

The stat. 4 Ann. c. 16, s. 4, giving power to plead several matters does not extend to actions at the suit of the King.†

1801.
Feb. 8.

[57]

A SCIRE FACIAS was brought against the defendants, on their bond to the King. *Manley* obtained a rule to shew cause why the defendant should not be at liberty to plead several matters; viz. *non est factum*, and performance of the condition, pursuant to the statute 4 Ann. c. 16, s. 4.

This application was made on the authority of the case of *The Attorney-General v. Shaw*, Bunbury, 96; and *The King v. The Archbishop of York*, Barnes, 359.

Plumer now shewed cause:

The question is, Whether the clause of the Act, giving liberty to plead double, extends to actions at the suit of the Crown? In the case cited from Barnes, it is said *that, by the 24th sect. †

[*58]

† Having regard to the fact that the rules of pleading in the Rules of the Supreme Court under the Judicature Acts do not affect the Crown, it seems useful to retain this case as

having established a rule of existing practice. See *R. v. Charlesworth*, 1 B. & S. 460; 31 L. J. M. C. 23; 5 L. T. 150.—R. C.

‡ That section enacts, "That from

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of the Act, a defendant may plead double, where the debt is immediately owing to the King: but it appears that the point before the Court in that case, was not on a debt to the King, but, Whether a double plea might be pleaded to a *quare impedit*? consequently there was no decision upon this point; and those words were probably added by the reporter.

With the exception therefore of the case in Bunbury, there has not been a single instance of any defendant pleading double, in a proceeding instituted on the behalf of the Crown; and even in that case the reporter puts a query, expressing a doubt in his own mind. There is a case in Hard. 189, where the defendants pleaded double to an action by the Crown; but that was by consent of the *Attorney-General*. Before the statute, no person could plead double; and the 4th section only speaks of plaintiff and defendant: the King therefore not being expressly mentioned, is not to be bound by it. Then does the 24th section give this power?

[*59]

The question was very much argued, and solemnly decided in the negative, in the case of **The Attorney-General v. Allgood, Parker 1*; that case underwent a very minute investigation: it arose out of an information of intrusion, which is a civil suit. It appears from Lord Chief Baron PARKER's words in this case, that his opinion was, That the 24th section does not apply to the power of pleading double to suits by the Crown, but is only meant to extend the provisions of *jeofails* to such actions. The reporter refers to the case of *The King v. Huggins*, Com. Rep. 422; to which the answer given is, that the case is misreported; that case therefore is not to be relied upon. He then notices *The Attorney-General v. Snow*. *The King v. Phillips*, in the year 1746, was a motion to plead double to a *scire facias*, exactly similar to this; and after several hearings and adjournments, the order for pleading double was discharged.† Since

and after the first day of Trinity Term, this Act, and all the statutes of *jeofails*, shall extend to all suits in any of her Majesty's courts of record at Westminster, for recovery of any debt immediately owing, or any revenue belonging to her Majesty, her heirs or successors; and shall

also extend to all courts of record in the counties palatine of Lancaster, Chester, and Durham, and the principality of Wales; and to all other courts of record within this kingdom."

† Vide Order Book of the Excheq. Hil. Term, 20 Geo. II. No. 30.

which, there is not a single instance of an attempt being made by a defendant to plead double to a suit by the Crown.

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But admitting that the defendant might plead double to an action at the suit of the Crown, yet he cannot plead *non est factum*; for this bond is a matter of record, and the defendant cannot deny the making of a record:

Manley, in support of the rule:

It is often very necessary for the justice of the case, that the defendant should be at liberty to plead double; and that necessity exists equally in actions brought by the *Crown, as in those between subject and subject. The words of the Act must be taken to extend to suits by the Crown; for in sect. 24, it is said, "This Act and all the statutes of *jeofails*, shall extend to all suits for the recovery of debts immediately owing, or any revenue belonging to the Crown." The case in *Bunbury* was subsequent to the determination in *Parker*; and in *Barnes* it is taken for clear, that upon a debt immediately due to the Crown, the party is at liberty to plead double.

[*60]

The case of *The King v. Huggins*, Com. Rep. 422, is precisely in point; and there is no ground to say that it is misreported, as it is in a book of unquestionable authority, under the hand of the Chief Baron of this Court. It is true, the case in *Parker* is to the contrary; but that case was decided not exactly upon this point, and without reference being made to any of the other cases. By the words of the statute, "This Act and all the statutes of *jeofails*," &c. it must be understood that all such clauses are intended as are of the same nature with *jeofails*. The two pleas are perfectly fair to be pleaded together, as there is an objection to this bond as not being a bond against these defendants; and it is by no means derogatory to the royal prerogative, that the validity of the bond should be disputed.

MACDONALD, Chief Baron:

The only question is, Whether the law upon this point has been completely settled, or not? That that is so, is proved *to demonstration. In the year 1743, and again in the year 1746, it was decided, after repeated consideration of the Court, upon

[*61]

THE KING ^{v.} CALDWELL. the ground that the clauses of this Act respecting *jeofails* only, are applicable to suits by the Crown, and not those giving defendants power to plead double. In the case in Bunbury, no order was made; and the bar seems to have been dissatisfied with the decision of the Court. The case in Barnes is not decisive of this point: the case in Comyns is misreported: then there are two consecutive determinations against the application, and no contradiction. We are therefore bound to refuse this rule.

HOTHAM and THOMPSON, Barons, of the same opinion.

GRAHAM, Baron:

This point is perfectly at rest: the case in Parker has decided it, and that decision is confirmed by the case of *The King v. Phillips*. If this bond be irregular, or if there be any objection to it, the party has a remedy by an application to the Court.

Rule discharged.

EXCH. TRINITY TERM.

1801.
July 9.

THE KING *v.* DE LA MOTTE, A LUNATIC.

(Forrest's Exch. Rep. 162—163.)

[*162]

An equity of redemption may be taken under an extent.

[*163]

PLUMER, on behalf of the Crown, applied to the Court to direct the sale of an estate belonging to a lunatic, which had been taken under an extent, but which was subject to a mortgage. A question *arose, Whether an equity of redemption could be taken under an extent?

Bell, consented, on the part of the mortgagee and committees of the lunatic, and stated, That a judgment creditor, who had sued out an *elegit*, or *fieri facias*, might apply to the Court to redeem the mortgage, and pay himself out of the residue.

The COURT therefore directed the sale of the estate; that the mortgage be first discharged, and the residue of the purchase-money paid into Court, to answer the extent.

ESPINASSE'S REPORTS.

Note.—In reprinting the following selection from Espinasse's reports, it seems advisable to repeat the caution given by Lord DENMAN, Ch. J. in *Small v. Nairne* (1849) 13 Q. B. (Ad. & El. N. S.) 844 :—" I am tempted (he says) to remark, for the benefit of the profession, that Espinasse's reports, in days nearer their own time, when their want of accuracy was better known than it is now, were never quoted without doubt and hesitation ; and a special reason was often given as an apology for citing that particular case. Now they are often cited as if counsel thought them of equal authority with Lord COKE's reports."

This caution has been kept in mind in making the selection. There remain, however, a considerable number of cases where a proposition of sound law, sometimes an elementary one, is frequently repeated in text books with a citation of Espinasse as the only or primary authority, so far as appears by reported decisions. A large proportion of the cases here collected belong to this category.—R. C.

K. B. (AT NISI PRIUS) EASTER TERM.

MORGAN v. SLAUGHTER.†

(1 Espinasse, 8—10.)

Covenant in a lease not to assign or underlet without leave of the landlord in writing, is consistent with a warranty that the lease (being that of a public-house) contains none but fair and usual covenants.

THIS was an action of assumpsit, brought to recover the penalty of 50*l.* for breach of an agreement.

† The judgment of Lord KENYON in this case is treated as an authority by the Court of Exchequer in *Folkingham v. Croft* (1796) 3 Anstr. 700, 4 R. B. 844. But a doubt is thrown upon both by Lord ELDON in

Church v. Brown (1808), 15 Ves. 258, 262.

The point however which Lord KENYON had to decide was a different one, and there is a very similar decision by V.-C. KINDERSLEY in

1793.
May 15.

[8]

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v.
SLAUGHTER.

The agreement stated in the declaration was, "That the defendant had agreed to assign to the plaintiff all his interest in a lease of a public-house, of which thirteen years were unexpired, and his good-will in the trade and business carried on in it, in consideration of 200*l.*; and it was further agreed, that the lease should contain none but fair and usual covenants; and each party bound himself to the performance, under a penalty of 50*l.*"

[*9]

The facts of the case were, that the defendant was possessed of such a lease, and for the time mentioned; but not having the lease *by him at the time he entered into the agreement stated in the declaration, he had made it part of the agreement, that when the lease came to be assigned, it should be found to contain none but fair and usual covenants.

The breach assigned in the declaration was, "That the lease did contain a certain covenant," viz. "That the lessee should not alien, assign, or under-let the premises, or any part of them, without leave of the lessor in writing for that purpose first had and obtained;" and then averred, that this was not a fair and usual covenant, and so that the defendant could not perform his agreement.

The counsel for the defendant insisted, that the covenant was a fair and usual one adopted in all leases, from the times of which there are any reports, and cited to that effect *Dumpor's* case, 4 Co. Rep. 119; where a question arose on this very covenant, "Whether the lessor, having once permitted an assignment, had not for ever dispensed with the covenant?"

For the plaintiff—*Mingay* relied on the case of *Henderson v.*

Strangways v. Bishop (1857) 29 L. T. (Old Series) 120, where *Church v. Brown* was cited in argument.

In regard to *Folkingham v. Croft* (4 R. R. 844), where the question arose upon an agreement for a lease of a public-house "with all usual and reasonable covenants, commonly inserted in leases of the same nature," it should be noted that in *Hampshire v. Wickens* (1878) 7 Ch. D. 555, 47 L. J. Ch. 243, 38 L. T. 408, the Master of the Rolls (JESSEL), under

an agreement to take a lease "on all usual covenants," decided that the lessor, insisting on the insertion of a covenant not to assign without consent, could not obtain specific performance. In *Church v. Brown* there was not in the agreement any express mention of covenants at all.

Whether there is in this class of cases a conflict of authority, or only room for fine distinctions, is not for us to decide.—R. C.

Hay, 3 Brown's Cas. Chanc. where, on a bill filed for the specific performance of an agreement to make a lease containing the fair † and usual covenants, THURLOW, Lord Chancellor, was of opinion, that the covenant in question was not of that description.

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Lord KENYON said, he could not entertain a doubt concerning this being a fair and usual covenant. That it was a fair covenant as providing properly for the interest of the party demising : and as to its being a usual one, that it sufficiently appeared to have been a usual one so long since as the case cited by the defendant's counsel ; and that he had never seen a lease properly drawn without it. That the plaintiff had therefore no cause of action, as the covenant was a fair and usual one ; and the defendant had always been ready to assign the lease, in pursuance of the agreement. His Lordship therefore directed a nonsuit.

[10]

K. B. (AT NISI PRIUS) TRINITY TERM.

DIBDIN v. SWAN AND BOSTOCK.‡

(1 *Espinasse*, 28—29.)

The editor of a public newspaper may fairly comment on any place of public entertainment ; nor shall such a paragraph be deemed a libel.

1793.
June 23.
At Westminster.

[28]

THIS was an action against the defendants for a libel.

The plaintiff was the proprietor of a place of public entertainment, called Sans Souci, where he sung and performed certain songs which were supposed to be written and composed by himself.

The defendants were the editor and the printer of a public newspaper called the *World*. The libel for which the action was brought, was a paragraph which appeared in that paper, insinuating that the songs were not in fact written by the plaintiff, but

† The agreement, according to the report in *Brown*, was to take a lease upon "common and usual covenants."

‡ Cited by WILLES, J. in *Henwood v. Harrison* (1872) L. R. 7 C. P. 606, 622; 41 L. J. C. P. 206; 26 L. T. 938.—R. C.

DIBDIN
v.
SWAN &
BOSTOCK.

a person of the name of Bickerstaff, with whom the plaintiff had formerly been connected in bringing out several musical pieces, which had been performed with a considerable share of public applause. The paragraph further mentioned, that on the first night of the performance there had been a very thin audience, and that composed of persons admitted under orders: that the music of the songs was of very inferior composition, and that the applause bestowed on the performance was only from the persons who had so gained admittance; whereas the songs, both as to the words and music, were the composition of the plaintiff only, there was a very full audience, and the applause was genuine, and from persons in no way connected with the plaintiff.

[29] Lord KENYON stated the law on this subject to be—That the editor of a public newspaper may fairly and candidly comment on any place or species of public entertainment; but it must be done fairly and without malice or view to injure or prejudice the proprietor in the eyes of the public. That if so done, however severe the censure, the justice of it screens the editor from legal animadversion; but if it can be proved that the comment is unjust, is malevolent, or exceeding the bounds of fair opinion, that such is a libel, and therefore actionable.

Mingay and Lambe for the plaintiff.

Erskine for the defendants.

K. B. (AT NISI PRIUS) MICHAELMAS
TERM.

DOE, EX DEM. WOODMASS, v. MASON.

(1 Espinasse, 53.)

1793.
Dec. 6.

[53]

In ejectment, the plaintiff held by lease under the city of London.

Per Lord KENYON :

The common seal of the city proves itself.

HARDING *v.* CRETHORN.(1 *Espinasse*, 57.)1793.
Dec. 10.

[57]

When a lease is expired, the tenant continues liable to the rent unless he delivers up complete possession of the premises, or the landlord accepts another in his room.†

Such acceptance may be proved by the landlord's privity to a notice by the former tenant to his under-tenant to pay his rent in future to the landlord; but his merely subscribing such a notice as witness would not prove his knowledge of the contents.

ASSUMPSIT for use and occupation. The case in evidence was, that the defendant had held the premises by lease under the plaintiff; which lease expired in June, 1792. During the continuance of the lease the premises had been let to an under-tenant, who had continued in possession after the lease expired; and the question was, Whether he had been accepted by the plaintiff, the lessor, as his tenant, or whether the defendant still continued liable to the rent accrued after the term expired, and during the time the under-tenant had continued in possession?

Per Lord KENYON :

When a lease is expired, the tenant's responsibility is not at an end; for if the premises are in possession of an under-tenant, the landlord may refuse to accept the possession, and hold the original lessee liable; for the lessor is entitled to receive the absolute possession at the end of the term. But it may be proved, that the lessor had accepted the under-tenant as his tenant, as by his having accepted the key from the original lessee, while the under-tenant was in possession, by his acceptance of rent from him, or by some act tantamount to it.

To prove the plaintiff's acquiescence to accept the under-tenant as his tenant when the lease had expired, a paper was produced, which was a notice from the defendant to the under-tenant then in possession, informing him that his (the defendant's)

† This ruling is confirmed by the judgment of the Queen's Bench in *Henderson v. Squire* (1869) L. R. 4 Q. B. 170; 38 L. J. Q. B. 73; 19 L. T. 601.—R. C.

HARDING
v.
CUTHORN.
[58]

term in the premises was expired ; and ordering him to pay his rent in future to the plaintiff as his landlord. This notice was witnessed by the plaintiff himself.

The counsel for the defendant contended that the circumstance of the plaintiff's having witnessed this notice, was conclusive evidence of his acceptance of the under-tenant in lieu of the defendant.

Lord KENYON ruled, That the merely subscribing an instrument as a witness, should not bind the party, unless there was some evidence that he was acquainted with its contents at the time, as one might subscribe his name merely as an instrumentary attestation without any knowledge of what he had so attested.

On this intimation of his Lordship's opinion, the defendant proved, that the notice had been read over in the plaintiff's presence, and that he had then subscribed it—his Lordship ruled that to be conclusive, and the defendant had a verdict.

Shepherd for the plaintiff.

Garrow for the defendant.

1793.
Dec. 12.

NEAL v. ERVING.

(1 Espinasse, 61.)

[61]

When one person subscribes a policy with the name of another, proof of his having done it in many instances, is evidence of a general authority, and sufficient to charge the person whose name is signed, without producing a power of attorney.

ASSUMPSIT on a policy of insurance underwritten by the defendant on a ship from Lynn to Weymouth.

To prove the subscribing of the defendant's name to the policy, the broker who had negotiated the policy was called. He proved that the defendant's name on the policy had been subscribed by one Hutchins. He was asked by what authority Hutchins had done it. He said, he did not know; but that Hutchins was in the constant habit of subscribing policies in the name of Erving, and had done several for him and others, to his knowledge.†

NEAL
v.
ERVING.

Erskine for the defendant objected to this evidence, on the ground that Hutchins must have done it by power of attorney from the defendant, which might have been limited, or for a particular purpose, and therefore that it should have been shewn that Hutchins was properly authorised, by producing the power of attorney.

Lord KENYON overruled the objection, and held that the acts of Hutchins held him out to the world as properly authorised; and his having subscribed several policies in the defendant's name, was sufficient evidence of that authority in order to charge the defendant: that if Hutchins was only a particular agent for the defendant, that it lay on him to shew it, not the plaintiff.

Mingay and *Shepherd* for the plaintiff.

Erskine and *Law* for the defendant.

† But where the witness added that he was not acquainted with any instance in which the defendant paid a loss upon a policy so subscribed, Lord ELLENBOROUGH held that the proof of agency must be carried fur-

ther. *Consteen v. Fowse*, 1 Camp. 43 (n). See also *Haughton v. Ewbank*, 4 Camp. 88; Arnold on Insurance, p. 1115, 5th ed.; Phillips on Insurance, 1114.—R. C.

K. B. (AT NISI PRIUS) HILARY TERM.

1794.
Feb. 18.DOE, EX DEM. PARRY, *v.* HAZELL.

(1 Espinasse, 94.)

[94]

Where a letting is by the month, a month's notice is sufficient to determine the tenancy.

EJECTMENT for an house.—The defendant had taken the house by the month; and a month's notice to quit had been given.

It was agreed that the notice had reference in all cases to the letting; and that a month's notice was sufficient to entitle the plaintiff to recover.

Marryat for the plaintiff.

Lawes for the defendant.

1794.
March 9.NAYLOR *v.* MANGLES ET AL.

(1 Espinasse, 109—110.)

[109]

A wharfinger has a lien on goods brought to his wharf for the balance of a general account.

ASSUMPSIT for money had and received.

The plaintiff had purchased from one Boyne twenty-five hogsheads of sugar then lying in the warehouses of the defendant, who was a wharfinger. Boyne was in debt to the defendant to the amount of 167*l.* part of which only was for the charges of these twenty-five hogsheads of sugar; the remainder was for the balance of a general account, for which the defendant claimed a lien, and refused to deliver them to the plaintiff till the whole sum was paid. The plaintiff paid him the whole money, and then brought this action to recover it back.

The whole question turned upon the point, Whether a wharfinger had a lien for the balance of a general account upon the goods in his possession?

The counsel for the defendant said, that it had been decided

in three different cases that they had; and called witnesses to prove it; with which the jury seemed completely satisfied.

NAYLOR
v.
MANGLES.

Lord KENYON said, liens were either by common law, usage, or agreement. Liens by common law were given where a party was obliged by law to receive goods, &c. in which case, as the law imposed the burthen, it also gave him the power of retaining for his indemnity. This was the case of inn-keepers who had by law such a lien. That a lien from usage was matter of evidence. The usage in the present case had been proved so often, he said it should be considered as a settled point, that wharfingers had the lien contended for.†

[110]

Bearcroft, Shepherd and Park for the plaintiff.

Erskine for the defendant.

K. B. (AT NISI PRIUS) EASTER TERM.

RUFF v. WEBB.

(1 Espinasse, 129—131.)

1794.
May 24.

At Guildhall.

[129]

A draft in these words, “Mr. N. will much oblige Mr. W. by paying to J. R. or order 21*l*. on his account,” is a bill of exchange,† and cannot be given in evidence without a stamp. Neither is such draft, though taken without objection by the party at the time, any discharge of a subsisting debt.

ASSUMPSIT for work and labour, with the common counts.

Plea of the general issue.

The action was brought to recover the amount of wages due by the defendant to the plaintiff.

The plaintiff had been servant to the defendant, and on his discharging him from his service, had given him a draft for the amount of his wages on an unstamped slip of paper, in the following words:—

† This ruling is referred to as having settled the law, by Lord ELDON, in *Spears v. Hartley*, 3 Esp. 81.—R. C.

‡ This seems to hold good with reference to the definition in the Bills of Exchange Act, 1882, 45 & 46 Vict. c. 61, s. 3. See Chalmers, p. 9.—R. Q.

RUFF
F.
WEBB. “ Mr. Nelson will much oblige Mr. Webb, by paying to J. Ruff, or order, twenty guineas on his account.”

This draft the plaintiff had taken, but it did not appear that he had ever demanded payment of it from Mr. Nelson, to whom it was addressed.

It was given in evidence on the part of the defendant, that he lived in the country, and kept cash with Mr. Nelson in London, and that he paid all his bills in that manner, by drafts on Nelson: that the plaintiff knew that circumstance, and took the draft without any objection; and that if he had applied to Nelson, that it would have been paid. This evidence was relied on as a discharge, and bar to the action.

[130] *Shepherd* for the plaintiff contended, that the only mode by which this could operate as a bar to the action, was by taking the draft in question as a bill of exchange; in which case, under stat. 3 & 4 Ann. c 9, s. 7, it is declared, that if any person shall accept a bill of exchange, in satisfaction of a debt, that the same shall be deemed a full and sufficient discharge, if the person so accepting such bill for his debt, shall not take his due course, by endeavouring to get the same accepted and paid, and making his protest for non-acceptance or non-payment; but he contended that in point of substance it was not a bill of exchange, but a mere request to pay money, not accepted by Nelson, or such as could put the plaintiff into any better situation with respect to his demand. But if it was taken as a bill of exchange, that it could not be given in evidence at all, as it was not stamped.

[131] It was answered by the defendant's counsel, that the plaintiff's having accepted the draft as payment, was a waiver of every objection to it, and that he was therefore bound by it, and could not recur to the demand for wages.

Lord KENYON said, he was of opinion, that the paper offered in evidence was a bill of exchange; that it was an order by one person to another to pay money to the plaintiff or his order, which was in point of form a bill of exchange; that as such it could not be given in evidence, without being legally stamped; and as the only mode in which it could operate as a discharge of

the plaintiff's demand was, as stated by the plaintiff's counsel, that the plaintiff in point of law was therefore entitled to recover.

RUFF
r.
WEBB.

Shepherd for the plaintiff.

Erskine and Baldwin for the defendant.

EMERSON *v.* BLONDEN.

(1 Espinasse, 142—143.)

1794.
June 7.

Where a husband permits his wife to act for him in any department or business, her admissions or acknowledgments are evidence to charge the husband.†

[142]

ASSUMPSIT for the use and occupation of certain rooms in the plaintiff's house, which had been let to the defendant.

The defendant and his wife had taken the apartments at a certain rent; the wife had made the bargain, and had agreed to give three months' notice of quitting. Having quitted without notice, the action was brought to recover the three months' rent.

A witness for the plaintiff proved a demand of the rent from the defendant's wife, and that she had acknowledged the sum claimed to be due, and had promised payment.

Mingay for the defendant, objected to this evidence, as it was admitting the declarations of the wife, and her acknowledgment of debt to charge the husband.

It was answered by the plaintiff's counsel, that the defendant having in the present instance permitted his wife to act for him in making the agreement, and settling the terms upon which the lodgings were taken, that he had thereby constituted her his agent for that purpose, and should therefore be bound by her acts and admissions.

Lord KENYON said that the rule of law had been correctly

† *O'Connor v. Marjoribanks*, 4 M. & G. 435.

EMERSON
v.
BLONDEN.
[*143]

stated by the plaintiff's counsel, that where a wife acts for her husband in any business or department, by his authority and with *his assent, that he thereby adopts her acts, and must be bound by any admission or acknowledgment made by her respecting that business, in which by his authority she has acted for him; and that therefore in the present case, her admission of the debt due to the plaintiff, on account of the lodging, was competent and admissible evidence to charge the husband.

The plaintiff had a verdict.

Erskine and Baldwin for the plaintiff.

Mingay for the defendant.

1794.
June 10.

[144]

REX v. BANKS.

(1 Espinasse, 144—147.)

In an information under the statutes (9 & 10 W. & M. c. 41 and 17 Geo. II. c. 40, s. 10) relating to the embezzlement of public stores, the defendant is not bound to produce a Navy Board certificate of the purchase of stores, but may prove by other evidence that he became legally possessed of them.†

THIS was an information against the defendant under the stats. 9 & 10 W. III. c. 41, and 17 G. II. c. 40, s. 10, for having naval stores in his possession. * * *

[146]

It was admitted on both sides, that the old and damaged stores belonging to the several yards of Woolwich, Chatham, &c. were at certain times sold by public auction, in different lots, by authority of the Navy Board; but at those sales, the buyer always received a certificate from the Navy Board that such stores mentioned in the certificate had been sold by them, and that he was the purchaser.

Upon this evidence, it was contended by the counsel for the prosecution, that the Acts of Parliament having made possession of naval stores, marked with the King's mark, complete evidence of guilt, that the only mode by which the defendant in an in-

† This point of the case is referred to in the judgment of WILLS, J. in *R. v. Tolson* (1889) 23 Q. B. D. 168, 178, 58 L. J. M. C. 97, upon the

principle of *mens rea*, as applied to a case of bigamy under the statute 24 & 25 Vict. c. 100, s. 57.—R. C.

formation for having such in his possession could discharge himself, was by producing the Navy Board certificate, granted at the time of the sale, as that was the only evidence of the legal possession of them.

REX
v.
BANKS.

Lord KENYON said, that it was clear, that in prosecutions under the statutes in question, it was sufficient for the Crown to prove the finding of the stores with the King's mark in the defendant's possession, to call upon him to account for that possession, and the manner of his coming by them ; so that of course, the *onus* lay on the defendant, of proving that he had legally become possessed *of them ; but that it could not bear a question, but that the defendant had other means of shewing that he had lawfully become possessed of them, than by the production of the certificate from the Navy Board : as for example, he might shew that he had bought them from another person who was in the practice of buying stores at the navy sales, and who therefore might fairly be presumed to have had the regular certificate, but who, when he sold part to the defendant, could not, consistent with his own safety, part with the certificate he had obtained, of his having been the purchaser of the whole lot. His Lordship said, he recollected a case in which this doctrine had been held by Mr. Justice FOSTER, who was one of the best Crown lawyers that had ever sat in Westminster Hall. That if the defendant therefore could shew either a navy certificate, or prove the purchase of the stores mentioned in the declaration, from any person who might be presumed to have been possessed of the proper certificate, from the circumstance of such person's having frequently been a purchaser at such sales, he was of opinion that it was such evidence as ought to induce the jury to find the defendant not guilty.

[*147]

The defendant did give such evidence, and was acquitted.

Bearcroft, Mingay, and Brodrick for the Crown.

Garrow for the defendant.

K. B. (AT NISI PRIUS) TRINITY TERM.

1794.
 July 18.
 At Guildhall.
 [172]

BRISTOW AND ALT. ASSIGNEES OF CLARK AND
 GILSON, BANKRUPTS, *v.* EASTMAN.†

(1 *Espinasse*, 172—174.)

An action for money had and received, will lie against an infant, to recover money which he had embezzled.

Infants are liable to actions *ex delicto*, but not to actions *ex contractu*, unless they arise from fraud. *Contra Beal v. Hiscox*, E. 39 G. III.

ASSUMPSIT for money had and received to the use of the plaintiffs, with the usual money counts.

The case as it appeared in evidence was, that the defendant had been apprentice to the bankrupts before their bankruptcy: that his principal employment, while he was in their service, had been in passing the ships engaged in their trade at the Custom-house, in making payments, and receiving money in that employment: but that in making out his returns to them of the monies expended on that account, he had made many very considerable overcharges, by which he had defrauded them of a very considerable sum of money; to recover back which was the object of the present action.

Mingay for the defendant, rested his defence (*inter alia*) upon the point, that during the time that he had been so employed by the bankrupts, he was an infant, and therefore an action for money had and received, which was founded on a contract, could not be maintained against him. * * *

[173] Lord KENYON said, That he was of opinion, that infancy was no defence to the action: that infants were liable to actions *ex delicto*, though not *ex contractu*; and though the present action was in its form an action of the latter description, yet it was of the former in point of substance: that if the assignees had brought an action of trover for any part of the property embezzled, or an action grounded on the fraud, that unquestion-

† *Re Seager, Seeley v. Briggs* (1889) 60 L. T. 665.

ably infancy would have been no defence; and as the object of the present action was precisely the same, that his opinion was, that the same rule of law should apply, and that infancy was no bar to the action. * * *

BRISTOW
†.
EASTMAN.

The plaintiff had a verdict. [174]

Garrow and *Lambe* for the plaintiff.

Mingay and *Marryat* for the defendant.

C. P. (AT NISI PRIUS) TRINITY TERM.

KNIGHT *v.* CROCKFORD.

(1 Espinasse, 190—194.)

1794.

*At Westmin-
ster.*

An agreement beginning "I A. B." though not otherwise signed by the party, is good within the Statute of Frauds.

[190]

THIS was an action brought by order of the Court of Chancery, to try the validity of an agreement for the sale of a public-house and premises. * * *

The plaintiff at the trial produced a memorandum of the agreement, beginning "I, James Crockford, agree to sell," &c. but signed only by the plaintiff, and witnessed by one Mills.

[Evidence having been given as to the facts,]

Adair, Serjt. of counsel for the defendant, objected, *inter alia*, That the agreement was void within the Statute of Frauds, as not being signed by the defendant, as required by the statute, it only beginning "I, James Crockford, agree," &c. and not having his name subscribed to it, which he contended the statute required. * * *

[192]

EYRE, Ch. J. said, That the agreement contained a sufficient signing within the Statute of Frauds, by beginning in the defendant's own hand-writing: "I, James Crockford, agree," &c. * * *

[193]

K. B. (AT NISI PRIUS) MICHAELMAS TERM.

1794.
Nov. 11.

At Westminster.

[203]

BROCK v. COPELAND.†

(1 Espinasse, 203—204.)

In an action on the case for keeping a dog used to bite, if the dog was kept on the defendant's premises, and the injury received in consequence of the plaintiff imprudently going on them, the action cannot be maintained.

But where there is a public way, or the owner of a mischievous animal suffers a way over his close to be used as a public one, if he keeps such animal in his close, he shall answer for any injury any person may sustain from it.

THIS was an action on the case, to recover damages for an injury received from the defendant's dog.

The declaration stated, that the defendant knowingly kept a dog used to bite; and then set out the injury received by the plaintiff.

The defendant pleaded not guilty.

It was given in evidence that the defendant was a carpenter, and that the dog was kept for the protection of his yard: that he was kept tied up all day, and was at that time very quiet and gentle, but was let loose at night. It was further proved that the plaintiff, who was foreman to the defendant, had gone into the yard after it had been shut up for the night, and the dog let out; at which time the injury happened, the dog having then bit and torn him.

On this evidence Lord KENYON ruled, that the action would not lie. He said that every man had a right to keep a dog for the protection of his yard or house: that the injury which this action was calculated to redress, was where an animal known to be mischievous was permitted to go at large, and the injury therefore arose from the fault of the owner in not securing such animal, so as not to endanger or injure the public: that here the dog had been properly let loose; and the injury had arisen from the *plaintiff's own fault, in incautiously going into the defendant's yard after it had been shut up.

[*204]

† Cited in *Bird v. Holbrook*, 4 Bing. 628, 638, and confirmed by *Sarch v. Blackburn*, 4 C. & P. 297.—R. C.

His Lordship added, that in a former case, where in an action against a man for keeping a mischievous bull, that had hurt the plaintiff, it having appeared in evidence that the plaintiff was crossing a field of the defendant's where the bull was kept, and where he had received the injury, the defendant's counsel contended, that the plaintiff having gone there of his own head, and having received the injury from his own fault, that an action would not lie: but that it appearing also in evidence that there was a contest concerning a right of way over this field wherein the bull was kept, and that the defendant had permitted several persons to go over it as an open way, that he had ruled in that case, and the Court of King's Bench had concurred in opinion with him, That the plaintiff having gone into the field, supposing that he had a right to go there, and the defendant having permitted persons to go there, as over a legal way, that he should not then be allowed to set up in his defence the right of keeping such an animal there as in his own close; but that the action was maintainable.

BROCK
v.
COPELAND.

In the chief case the plaintiff was nonsuited.

Erskine and Henderson for the plaintiff.

Garrow for the defendant.

AMERY v. ROGERS.

(1 Espinasse, 207—209.)

1794.
Dec. 18.

Where there is a joint insurance directed to be made on a ship and cargo, and part only attaches, the assured is only entitled to recover proportionately.

At Guildhall.
[207]

THIS was an action of assumpsit, on a policy of insurance on the ship *Dart*, from St. Kitts to London: the defendant had underwritten 200*l*.

No question arose concerning the loss; the only doubt was, how far the plaintiff was entitled to recover.

[208]

The policy was on the ship and cargo.

The evidence was, That Amery the plaintiff, who was the proprietor of the ship and cargo, had written from St. Kitts in the

AMERY
v.
ROGERS.

month of October, 1793, to his agent in London, to effect a policy on the ship and cargo to the amount of 5,500*l.* calculating the ship at 1,500*l.* and the remainder on the cargo. No part of the cargo had ever been taken on board, so that in fact the policy had attached only on the ship.

In estimating the sum which the plaintiff was entitled to recover, the counsel for the defendant contended, that as no part of the policy had ever attached on the cargo, the plaintiff was only entitled to recover such a proportion of the sum which the defendant had underwritten, as the property upon which the policy attached bore to the whole.

Lord KENYON was inclined to be of opinion, That as the whole of the policy of 600*l.* which was all that had been effected on the ship, was less than its value, that the plaintiff was entitled to go for the whole of the sum underwritten by the defendant. But the jury having intimated to his Lordship, that the rule as mentioned by the defendant's counsel, was that adopted in settling policies at Lloyd's Coffee-house, his Lordship assented to their giving their verdict by such mode of calculation.

[209] A question then arose, how far an interest in the ship had been proved to be in the plaintiff, to entitle him to maintain his action.

Lord KENYON ruled, That his having exercised acts of ownership in directing the loading, &c. of the ship, and paying the people employed, was sufficient proof of interest.

Pigott, —, and *Marryat* for the plaintiff.

Mingay and *Giles* for the defendant.

THE KING, ON THE PROSECUTION OF SERMON, *v.*
LORD ABINGDON.†

(1 *Espinasse*, 226—229.)

1794.
Dec. 6.

[226]

If a member of Parliament publish in the newspapers his speech as delivered in Parliament, and it contains charges of a slanderous nature against an individual, an information will lie for a libel; though had the words been merely delivered in Parliament, they would be punishable in the Courts at Westminster.

In a criminal prosecution where the defendant calls no witnesses, the counsel for the prosecution are not entitled to a reply.

THIS was an information filed by leave of the Court against the defendant for a libel.

The libel complained of was a paragraph in the public newspapers, stated to be part of a speech delivered by Lord Abingdon in the House of Lords.

The circumstances under which it had been given to the world as they appeared in evidence were, that Lord Abingdon having in the House of Lords given notice of his intention to bring in a bill the ensuing Session of Parliament, to regulate the practice of attornies, had in the course of his speech mentioned his having employed Mr. Sermon of Gray's Inn as his attorney, and after much invective, charged him with improper conduct in his profession, with pettyfogging practices, and other matters highly injurious to the character of Mr. Sermon. This speech his Lordship read in the House of Lords from a written paper; which paper he had, at his own expense, sent and had printed in several of the public papers.

This trial exhibited the novel spectacle in Westminster Hall of a peer, unassisted by counsel or attorney, appearing to plead his own cause.

His Lordship admitted the writing and publishing of the paper charged in the information, but contended that it was not a libel, inasmuch as the several matters charged in it were true. But to substantiate his allegations against Mr. Sermon, called no witnesses, nor adduced any evidence whatever.

[227]

In the beginning of his speech his Lordship stated it to be the privilege of peers, situated as he was, to sit covered in court, and

† See *Wuson v. Walter* (1868) L. R. L. T. 409.—R. C.

4 Q. B. 73, 83, 38 L. J. Q. B. 34, 19

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v.
LORD
ABINGDON.

have a place assigned to them. He relied on only one matter of law, namely, that as the law and custom of Parliament allows a member to state in the House any facts or matters, however they might reflect on an individual, or charge him with any crimes or offences whatsoever, and such was dispunishable by the law of Parliament, his Lordship from thence contended, that he had a right to print what he had a right to deliver, without punishment or animadversion.

When his Lordship sat down, *Erskine*, of counsel for the prosecution, rose to reply.

Lord KENYON observed, that as the defendant had called no witnesses, he thought it irregular in the counsel for the prosecution to reply.

[228]

It was answered, that it was a privilege of the counsel for the prosecution, and said to have been often allowed on circuit.

Lord KENYON said, that though the *Attorney-General* might be entitled to it, it was a privilege he thought no other counsel for the prosecution ought to have: that he had never claimed it while a counsel, and holding a high office under the Crown; and that he would not now make a precedent of what he disapproved.

The CHIEF JUSTICE then proceeded to observe, that with respect to the privilege claimed by Lord Abingdon, in the present case none such existed. That as to the words in question, had they been spoken in the House of Lords, and confined to its walls, that Court would have no jurisdiction to call his Lordship before them, to answer for them as an offence; but that in the present case, the offence was the publication under his authority and sanction, and at his expense. That a Member of Parliament had certainly a right to publish his speech, but that speech should not be made the vehicle of slander against any individual; if it was, it was a libel: that in order to constitute a libel, the mind must be in fault, and shew a malicious intention to defame; for if published inadvertently, it would not be a libel; but where

a libellous publication appeared unexplained by any evidence, the jury should judge from the overt act; and where the publication contained a charge slanderous in its nature, should from thence infer that the intention was malicious.

THE KING
v.
LORD
ABINGDON.

The jury found his Lordship guilty. [229]

* * In the next Term, Lord Abingdon was brought up to receive the judgment of the Court, which was, that he should be imprisoned for three months, pay a fine of 100*l.* and find security for his good behaviour.

M'MASTERS v. SHOOLBRED.

(1 Espinasse, 237—239.)

1794.
Dec. 12.

Where a ship insured had been captured and brought into a neutral port, and sold by the captors, and the captain bought her for the benefit of the owners, they shall only be entitled to recover on a policy the sum paid by the captain, and what may be expended in her outfit, and cannot recover for a total loss.

[237]

Assumpsit on a policy of insurance.

The insurance was on a ship called the *Four Brothers*, to commence from the 17th of March, 1793, for six months, from any port.—The ship valued at 1,000*l.*

It was proved that the ship sailed from New Brunswick, with a cargo of fish for Barbadoes, and was captured by the *Ambuscade*, *French frigate, and carried into Charlestown, in North America, where she remained upwards of a month, and was then sold by authority of the French consul there, as a prize, by public vendue, and was purchased by the captain (who had been exchanged) for 380*l.* on account of the owners. In addition to this sum so paid for the vessel, 230*l.* was paid by the captain, after he had purchased her, for necessary repairs at Charlestown, and for fitting her out again for a voyage: after which she sailed for Jamaica.

[*238]

The defendants, the insurers, had paid 60*l.* per cent. into court, as for an average loss.

Erskine and *Baldwin* for the plaintiff contended, that the

M^r.MASTERS ship having been captured, and sold by the captors, after being a
 SHOOLBRED. month in their possession, that it was a total loss, for which he
 was entitled to recover.

Bower and Garrow for the defendants, the underwriters.

* * *

[239] Lord KENYON said, it was impossible to make this more than an average loss : that a policy of insurance was a contract of indemnity, to which, and which only, the insured had a right to look : this was the language of Roccus, and its principle had been adopted in every decision on the subject ; that it had been decided, that if a ship had been sunk and weighed up again, if it was restored to the owners they had only a right to go for an average loss.—Such also was the case of ransoms ; that in the present case, the captain was to be considered as the agent for the owners, as recovering so much property on their account, and that they had therefore a right to recover only so much as was the amount of the injury their property had sustained, which was an average loss ; and the only question would be for the jury to calculate, Whether the 60*l.* per cent. paid into court, covered the whole of the loss the insured had sustained or not ?

It was admitted by his Lordship and the counsel, That when the ship had been captured and carried into port in the enemy's possession, the insured might then have abandoned it, and so have made it a total loss : and the counsel for the plaintiff attempted to make out in evidence, that the insured had offered to do so.—But it appeared to be an offer to abandon, on terms of the defendants paying certain bills, which they not thinking themselves liable to pay, had refused. Upon which his Lordship added, that not having abandoned in the first instance, but having recovered the ship, they were bound to go for an average loss only. * * *

K. B. (AT NISI PRIUS) HILARY TERM.

WISSEN *v.* ROBERTS.

(1 Espinasse, 261—262.)

Where by mistake payment of a bill had been demanded from the acceptor the day before it became due, in an action against the drawer he shall be nonsuited, the demand being premature.†

1795.
Feb. 1.
At Westminster.
[261]

THIS was an action of assumpsit, against the defendant, as the drawer of a bill of exchange.

Plea of the general issue. * * *

To prove a demand of payment of the bill from Yates, the acceptor, the plaintiff called the notary by whom it had been made: on producing the bill to him, it appeared that it had been noted as demanded, on the 3rd of February; and he admitted that it had been demanded on that day.

[262]

LORD KENYON said, that the plaintiff must be called—that the bill did not become payable until the 4th of February, which was allowing the three days of grace, after the first of that month when the bill became due; and that non-payment by the acceptor on the day before the bill became due, was not such a default in him, as could authorise the holder to have recourse to the drawer.

The plaintiff was nonsuited.

Erskine and Bayley for the plaintiff.

Wigley for the defendant.

SHIRLEY *v.* NEWMAN.

(1 Espinasse, 266—267.)

Where rent is reserved quarterly, it does not dispense with the necessity of six months' notice to quit. But when three months' notice only were given, and the lessor neither expressed an assent or dissent to the accepting it, and took the rent up to the time when the tenant quitted, it shall be taken as a waiver of the regular notice to quit, and an acquiescence on the part of the lessor.

1795.
Feb. 14.
At Guildhall.
[266]

ASSUMPSIT for use and occupation.

Plea of the general issue.

† *Rouquette v. Overmann* (1875) L. R. 10 Q. B. 525, 542; 44 L. J. Q. B. 221; Bills of Exchange Act, 1882, s. 14, s. 45 (1).

† Now a year, in agricultural holdings, under the Act of 1883, 46 & 47 Vict. c. 61, s. 33.—R. C.

SHIRLEY
v.
NEWMAN.

The defendant had been tenant to the plaintiff from year to year, commencing at Lady-day; the rent was payable quarterly: at Christmas the defendant gave notice that he would quit the premises at the Lady-day following; the circumstances as proved on his part were, that this notice to quit had been left at the house of the person who received the rents of the estate; that he had put it on his file of notices, and had neither expressed his assent or dissent to the accepting it as a notice to quit.—The rent was paid up to Lady-day, when the tenant quitted; and the action was for rent accruing subsequent to that time.

[*267]

The defendant relied on two grounds: first, That the rent being payable quarterly, that a quarter's notice to quit was sufficient; but secondly, That if by law it was not sufficient, that the defendant's acceptance of the notice to quit at the end of three *months, and that being at the end of the year, was a waiver of the notice, which by law would otherwise be necessary.

It was answered by the counsel for the plaintiff, that the manner of paying the rent made no alteration as to the tenancy, which was from year to year; and that it therefore was incumbent on the defendant to have given half a year's notice of quitting, as was required by law, in cases of such holdings. As to the second point, they insisted that the tacit receipt of a notice, without any evidence of acquiescence on the part of the plaintiff, could not be construed into a waiver of the regular notice.

Lord KENYON said, that the tenancy was from year to year; and that in such cases no notice short of six months, and determinable with the year was sufficient; and that the mode of payment of the rent, whether half-yearly or quarterly, was a collateral matter, and no dispensation or qualification of the regular six months' notice required by law: but his Lordship added, that by agreement, the parties might dispense with the notice, and the acquiescence of the parties was presumptive evidence of such agreement; and he was of opinion, that in this case there was evidence of acquiescence, as the plaintiff had received the notice to quit at the end of three months, and never

expressed to the defendant any dissent whatever, which he thought he should have done, if he had meant to have refused his assent to the defendant's quitting according to the notice.

SHIRLEY
v.
NEWMAN.

Erskine and Shepherd for the plaintiff.

Mingay for the defendant.

BROWN v. MCKINALLY.†

(1 Espinasse, 279—280.)

1795.
Feb. 17.

[279]

Where a party sued on a claim pays it voluntarily, he cannot recover the money in assumpsit, though at the time he pays it, he declares that he pays it without prejudice to his right to recover.

ASSUMPSIT for money had and received.

Plea of the general issue.

The plaintiff and defendant being in the same line of business, entered into an agreement, by which the defendant agreed to sell the plaintiff all his old iron, except bushel-iron, which was of an inferior quality, at 9*l.* per ton.

The iron he delivered was mixed iron, of an inferior value, being part bushel-iron, and charged the full value of the best sort: the plaintiff objecting to the charge, the defendant now brought an action for it.—The plaintiff paid the full demand so made on him, at the same time telling the defendant, that he did it without prejudice; and meant to bring an action to recover back the overplus so paid.

This action was brought for that purpose.

When the case was opened by the plaintiff's counsel, Lord KENYON said, that such an action could not be maintained. That to allow it, would be to try every such question twice; for that the same legal ground that would entitle the plaintiff to recover in the present action, would have been a good defence to the action brought against him by the present defendant; at which time and in which manner he should have proceeded: that money paid by mistake was recoverable in assumpsit; but here it

† See *Davis v. Hedges* (1871) L. R. 6 Q. B. 687, 692, 40 L. J. Q. B. 276, 25 L. T. 155.—B. C.

BROWN was paid voluntarily, and so could not be recovered under the
 M'KINALLY. circumstances of this case.

[280]

Erskine and *Reader* for the plaintiff.

Garrow for the defendant.

K. B. (AT NISI PRIUS) MICHAELMAS TERM.

1795.
 Dec. 17.

LEIGH v. MATHER.

(1 *Espinasse*, 412—413.)

[412]

Where a ship is insured "to — and until moored twenty-four hours in safety," the risk terminates on the ship arriving and voluntarily remaining so moored at any port within —.

THIS was an action on a policy of insurance on the ship *Palliser*, at and from Georgia to Jamaica, and till moored twenty-four hours in safety. The policy was on the ship and goods.

The ship sailed from Georgia, and arrived at Montego-Bay, in the island of Jamaica. She remained there for nearly a month, and then sailed for St. Ann's, in that island, and was lost in her passage thither.

The defence was, that the policy ended on the ship's arrival at Montego-Bay and remaining there twenty-four hours, and that the loss was therefore not within the policy, it having happened after her departure.

[*413]

Erskine, for the plaintiff, contended, that the policy being in general terms "to Jamaica," that it meant to include all the ports in that island to which any part of her cargo was to be delivered; and contended, that it was matter of evidence to shew to what *port, in fact, she was bound. He contended, that in this respect there was a difference where the policy was on the ship and on goods, and that the policy would cover the latter, though not the former.

Lord KENYON said, that where a ship is insured to any particular port of delivery, if, by stress of weather, she is forced into

LEIGH
v.
MATHER.

a different port, and there discharges part of her cargo, and afterwards proceeds to her port of delivery, he was of opinion that the policy remained good; but that where a ship, under a general policy to Jamaica, and until moored twenty-four hours, came to any port, and there voluntarily remained, and discharged part of her cargo, such, in his opinion, put an end to the policy after remaining there twenty-four hours, whether the policy was on ship or on goods. His Lordship, however, left the jury to state their ideas as to the policy.

The jury said, that when a person insured goods, to a particular port, though the ship might touch at another port, and remain there for twenty-four hours, that, notwithstanding, the policy remained in force; but that where the same person insured both ship and goods, as in the present instance, there, by the touching at any port, and remaining there twenty-four hours, the policy was discharged as to all other ports.

Lord KENYON assented to this distinction, and the plaintiff withdrew his record.

Erskine and Giles for the plaintiff.

Law, Gibbs and Park for the defendant.

K. B. (AT NISI PRIUS) HILARY TERM.

ROHL v. PARR.

(1 *Espinasse*, 445—446.)

Where a ship's bottom has, during the voyage insured, been taken by the worm, in consequence of which she is incapable of proceeding on her voyage, and is condemned, this is not a loss by perils of the sea, within the meaning of the policy.

In a policy on cargo an exception of average loss under per cent., has reference to the amount of risk at the time of the loss, and not to a full cargo taken in afterwards.†

CASE on a policy of insurance on the ship *Zumbee* [and cargo?], from St. Bartholomew to the river Gombroon, on the

† See *Phillips on Insurance*, § 1774.

1796
Feb. 27.

[445]

ROHL
v.
PAER.

coast of Africa, and from thence to the West Indies, during her stay. There was a memorandum, "to be free from average, under ten per cent. for loss in boats, and from five per cent. for loss from insurrection."

The ship sailed from St. Bartholomew on the 1st of September, 1792, arrived safe on the coast of Africa, and began to trade. In the month of September following, there was an insurrection of the slaves on board the ship. They had then forty-nine on board, and seven were killed, and one died by accident, in consequence of a fall.

After this, being about to return, it was found that the worm had taken her bottom, and had destroyed it so effectually, that the ship could barely get to Cape Coast, where she was condemned as irreparable.

Upon these facts, two points arose in the case; 1st, Whether this was a total loss arising from the perils of the sea; or, 2ndly, A partial loss above five per cent., for which the plaintiff was entitled to recover.

Gibbs, for the plaintiff, contended, that the destruction of the ship's bottom from worms, having arisen in the course of her voyage, was a peril of the sea. If the ship had struck against a rock under water, and her bottom been destroyed, that would have been clearly within the policy; there it proceeded from an inanimate substance striking against the ship's bottom. The present case was that of an animated substance moving to destroy it.

Erskine, contra, insisted that it could not come under that description of loss, as not arising from any peril of the sea.

[446]

Lord KENYON said that it appeared to him a question of fact, rather than of law, such as the jury were competent to decide on, from the opinion on the subject adopted by the underwriters and merchants.

The jury (which was a special one) found, that this was not a loss within the term of perils of the sea in policies of insurance, and of course that the plaintiff could not recover for a total loss.

ROHL
v.
PARR.

It then became a question, as to the partial loss from the insurrection, which it was necessary should exceed five per cent. in order to give the plaintiff a title to recover. If the calculation was taken at the time when the loss happened by the insurrection, when the slaves were killed, then above five per cent. was the loss; but if at the time of the condemnation of the ship at Cape Coast, at which time the whole cargo was sold, it would be under five per cent.

Upon this point also, the opinion of the jury was taken. Mr. Vaux, an eminent underwriter, having been examined as to both points, they found, that the time at which the calculation was to be made, was at the time when the loss happened, at which time the proportion of the loss to the cargo then on board, was to regulate the loss.

Lord KENYON expressed his assent to the finding of the jury on both points.

The plaintiff had a verdict for an average loss.

Gibbs, Smith, and Park for the plaintiff.

Erskine and Garrow for the defendant.

CURRY v. WALTER.†

(1 Espinasse, 456—457.)

1796.

[456]

A barrister cannot be called as a witness, to prove what was stated by him on a motion before the Court.

THIS was an action on the case, for a libel.

The libel for which the action was brought, was an account published in the newspaper called the *Times*, of which the defendant was the proprietor, of an application made to the Court of King's Bench, by *Mr. Erskine* for an information against the defendant, for misconduct as a magistrate.

Mr. Erskine was subpoenaed to prove that such a motion [457]

† See further *Curry v. Walter*, 4 R. B. 717, 1 Bos. & P. 525.

CURRY
†
WALTER.

had been made, and that he had in fact stated, on that application, what the newspaper had reported him to have said.

Upon *Mr. Erskine's* coming into court, EYRE, Chief Justice, said, he was of opinion that a barrister should not be called as a witness to prove such a circumstance, but that the party should prove it by other means, or by other witnesses who were present at the time of the motion; but that it should be at the option of the counsel, whether he would give his testimony or not.

Mr. Erskine said, he would not volunteer the giving of evidence on such an occasion, and retired. * * *

K. B. (AT NISI PRIUS) TRINITY TERM.

1795.

DOE, EX DEM. COLCLOUGH, *v.* MULLINER.†

(1 Espinasse, 460.)

Stafford
Summer
Assizes.

Encroachments by the tenant on the waste, do not belong to the landlord.

KENYON, C.J.

[460]

EJECTMENT by landlord, after the expiration of a lease, against his tenant, for the recovery of a garden, which the tenant had gained during his tenancy by encroachment.

Lord KENYON revolted at the idea that the tenant could make the landlord a trespasser; which, he said, would unavoidably be the case, if the landlord could recover in this ejectment. His Lordship laid it down as clear law, that if a tenant inclose part of a waste, and is in possession thereof so long as to acquire a possessory right to it, such inclosure does not belong to the landlord; but if the tenant has acknowledged that he held such inclosed part of his landlord, this would make a difference; and he refused to save the point.

Leycester for the plaintiff.

Plumer for the defendant.

† See the observations on this and the following case in *Lisburn (Earl) v. Davies* (1866) L. R. 1 C. P. 259, 266, 35 L. J. C. P. 193, 13 L. T. 795;

Whitmore v. Humphries (1871) L. R. 7 C. P. 1, 6, 41 L. J. C. P. 43, 25 L. T. 496.—R. O.

DOE, EX DEM. CHALLNOR, v. DAVIES.†

(1 Espinasse, 461—462.)

Same point as last case.

1795.

*Shrewsbury
Summer
Assizes.*

THOMSON, B.

[461]

EJECTMENT for two pieces of land, part of a common in the county of Salop, which had been inclosed by the defendant and another, who occupied a farm of the plaintiffs, contiguous to the common on which the encroachment had been made.

The case stated on the part of the plaintiff was, that in the year 1721, a Mr. Vaughan let Challnor's farm to Richard Davies, for ninety-nine years, if three persons should so long live, the last of whom died twelve months ago. Soon after the making of the lease, the tenant then in possession took a patch of land belonging to the common immediately contiguous to the farm. It appeared that there was no communication between the farms and the inclosure, but the gate from the inclosure led from the waste. It also appeared, that about forty years ago the then tenant made another encroachment on the common, by inclosing another piece of land adjoining the first encroachment, but not communicating with the farm.

The ejectment was brought (the lease being now expired) for the recovery of these encroachments, which the tenant had not given up with the rest of the farm; and it was contended on the part of the lessor of the plaintiff, that the encroachments must be taken to have been made for his benefit.

It was contended, on the part of the plaintiff, that it was clear law, that if the encroached land had been laid to the farm, then it must be taken to have been for the benefit of the landlord; which was acceded to by the defendant's counsel, under this limitation, if the landlord had shewed his assent to such trespass, as in the case of a lease from year to year.

[462]

The learned Judge intimated a strong opinion against the plaintiff in this case; but *Mr. Leycester* mentioning that it had been admitted in a case before *Perryn*, Baron, at Hereford, wherein *Mr. Bower* and *Mr. Plumer* had been counsel, that en-

† See note to last case.

DOE
v.
DAVIES.

croachments by tenants were for the benefit of their landlords; and that the same doctrine had been recognized by HEATH and BULLER, Justices, upon this circuit; his Lordship, out of deference to such high authorities, declined to nonsuit the plaintiff, which he otherwise would have done; and the plaintiff obtained a verdict.

Plumer and Leycester for the plaintiff.

Milles and ——— for the defendant.

K. B. (AT NISI PRIUS) EASTER TERM.

1796.
May 23.

CRANTZ v. GILL.

(2 Espinasse, 471—472.)

[471]

Where a father gives his son a reasonable allowance for his expenses, the son is solely liable; neither shall the father be liable even for necessities.†

ASSUMPSIT for the goods sold and delivered.

Plea of the general issue.

The action was brought to recover a sum of money for clothes furnished by the plaintiff, who was a tailor, to the defendant's son, an infant.

The plaintiff proved the clothes were furnished to the young man, and that the prices were reasonable.

The case in evidence on the defence was, that the father (the defendant) resided in Cumberland, and had sent his son up to London, to be employed in the business of a haberdasher. That he had sent him to the care of a Mr. Atkinson, with instructions to him to pay a proper sum for providing the young man with necessities suitable to his situation.

[472]

Mr. Atkinson was called, and he proved the above circumstances, and *that he had in fact paid the son an allowance while he was in London, by his father's directions; that he had

† As to the liability of the infant, Q. B. D. 509, 57 L. J. Q. B. 6, and see *Johnstone v. Marks* (1887) 19 cases there referred to.—R. C.

ordered clothes for him, but never pledged the father's credit in any respect.

CRANTZ
v.
GILL;

Per LORD KENYON :

The goods being furnished to the son, he is himself *primâ facie* liable, they being necessities ; if tradesmen deal with him, and he undertakes to pay them, they must resort to him for payment : the father, it is true, may be liable for necessities furnished to his son on his credit ; but when he gives his son an allowance, that is in lieu of all charges, the father cannot be bound by law to pay even for necessities furnished to the son under those circumstances. It would be a great hardship on the father, who would so be obliged twice to pay for necessities furnished to his son.

The defendant had a verdict.

Erskine and Chambre for the plaintiff.

Law for the defendant.

DILK v. KEIGHLEY.

(2 Espinasse, 480—482.)

1796.
June 21.

Where an infant carries on trade, an action is not maintainable against him for work done for him in the course of that trade which he so carries on, on his own account, and whereby he gains his living.

[480]

CASE for work and labour.

Plea of infancy.

Replication of necessities.

[481]

The plaintiff was a writing painter, and the defendant a glazier and painter, and the work was done by the plaintiff in the way of his trade, in painting and gilding letters for the defendant's customers.

On the case being opened, Lord KENYON expressed an opinion that the action was not maintainable, the plaintiff's counsel having admitted the infancy.

It was contended by the defendant's counsel, that those things were to be deemed necessities by which an infant gained his

DILK
v.
KEIGHLEY.

living: that in the present case the defendant carried on trade on his own account, and the work having been done for his customers, for which he himself had been paid, and whereby he lived, was to be deemed necessities for which he should be liable.

Per LORD KENYON:

The law will not allow an infant to trade. The substratum of the present action is, therefore, that which by law cannot be done. No action can therefore be maintained for work done in the course of it.

[482]

The plaintiff was nonsuited.†

Garrow and Wood for the plaintiff.

Mingay for the defendant.

K. B. (AT NISI PRIUS) HILARY TERM.

ARDEN v. SHARPE AND GILSON.

(2 Espinasse, 524—525.)

1797.
Feb. 15.

At Westmin-
ster.

[524]

Where one partner puts the name of the firm to a bill of exchange, but the party at whose request it is done, knows that it is not on the partnership account, nor for their benefit, but is the act of the partner only, he cannot sue the firm on that bill.‡

THIS was an action of assumpsit by the plaintiff as indorsee of a bill of exchange, drawn by R. Cowan on one Rae, at two months after date, in favour of R. Packer, for 60*l.* dated the 4th of March, 1796.

† In the case of *Hitchcock v. Tyson*, Sittings at Guildhall in Hilary Term, 1786, before Buller, J. the pleadings were the same as in the above case; but the defendant had paid money into Court.—*Mingay* for the plaintiff at the trial objected: that the defendant having paid money into Court, could not avail himself of his infancy, the paying money into Court being an admission of the

plaintiff's right of action.—But Mr. Justice BULLER ruled that he might, as the money paid into Court might be for necessities; and the plaintiff was nonsuited.

‡ *Leveson v. Lane* (1862) 13 C. B. N. S. 278, 31 L. J. C. P. 10, 7 L. T. 326; *Ex parte Darlington, &c., Co., Re Riches* (1864) 4 De G. J. & S. 581, 34 L. J. Bky. 10, 11 L. T. N. S. 651.

ARDEN
v.
SHARPE.

The case, as proved on the part of the plaintiff, was, that on the 1st of March, the day on which the bill bore date, Gilson, one of the defendants, brought the bill in question to the plaintiff, and requested him to discount it; the plaintiff said he could not do it himself; upon which the defendant Gilson answered, he could get it done for him, but wished the business to be kept a secret from his partner Mr. Sharpe; to which the plaintiff assented, and took his bill.

The witness then proved, that the indorsement "Sharpe and * Gilson," was in the handwriting of Gilson.

[*525]

On this evidence the plaintiff rested his case.

LORD KENTON :

This action, under the present proof, cannot be supported; the bill is indorsed by one partner in the name of the firm; one partner certainly may indorse a bill in the partnership name; and if it goes into the world, and gets into the hands of a *bonâ fide* holder, who takes it on the credit of the partnership name, and is ignorant of the circumstances, though in fact the bill was first discounted for that one partner's own use, in such case the partnership is liable; but the case is different where the party who brings the action was himself the person who took the bill with the indorsement by one partner only, and was informed that the transaction was to be concealed from the other: he cannot sue the partnership; the transaction indicates that the money was for that partner's own use, and not raised on the partnership account, [the plaintiff] therefore shall not be allowed to resort to the security of the partnership, to whom in the original transaction he neither looked nor trusted.

The plaintiff was nonsuited.

Garrow and Manley for the plaintiff.

Erskine and 'Espinasse for the defendants.

C. P. (AT NISI PRIUS) HILARY TERM.

ASTON v. HEAVEN AND ALT.

(2 Espinasse, 533—536.)

1797.
Feb. 21.

At Westminster.

[533]

Coach owners are not liable for injuries happening to passengers, from accident or misfortune, where there has been no negligence or default in the driver. Where there is no other carriage on the road, the driver may keep in the middle of the road, and is not bound to keep on the left hand side of the road, even though the accident might have proceeded from the coach not being on the proper side.†

CASE against the defendants as proprietors of the Salisbury stage-coach, for negligence in the driving of the said coach; in consequence of which the coach was overset, and the plaintiff much bruised and her finger broke.

The plaintiff proved the oversetting of the coach, and the accident having happened from the oversetting of the coach, she being an outside passenger.

The defence relied upon was, that the coach was driving at a regular pace on the Hammersmith road, but that on the side was a pump of considerable height, from whence the water was falling into a tub below; that the sun shone bright at the time, and being reflected strongly from the water, the horses had taken fright and run against the bank at the opposite side, where it was overset.

These facts were made out in evidence; but it also appeared that at the time of the accident, the coach was not driving on the right side of the road, but on the middle of it; but that in fact there was no other *carriage at that time on the road.

] *534]

Adair, Serjt. for the plaintiff contended, that this was no defence to the action. He contended that this was the case of an action against a carrier, and the same rule, as in the case of goods, applied to the case of the carriage of the person; and that they

† The following cases bear upon the same principle:—*White v. Boulton*, 1 Peake, 113, 3 R. R. 657; *Readhead v. Midland Ry. Co.* (1867-69) L. R. 2 Q. B. 412, 419, 4 Q. B. 379, 388, 36 L. J. Q. B. 181, 38 L. J. Q. B. 169, 16 L. T. 485; *Simson v. London*

General Omnibus Co. (1873) L. R. 8 C. P. 390, 42 L. J. C. P. 112, 38 L. T. 560; *Richardson v. G. E. Ry. Co.* (1875, 1876) L. R. 10 C. P. 486, 1 C. P. D. 342, 32 L. T. 248, 35 L. T. 351.—B. C.

ASTON
v.
HEAVEN.

should be liable in all cases, except where the loss or injury arose from the act of God or of the King's enemies. So that, let the mischief happen under what circumstances it would, except in those two mentioned, the carrier should be liable.

But should it be necessary to prove positive negligence, he relied that there was evidence of it here, it having been proved that the carriage was driving in the middle of the road, whereas had it been driving on the left side, which by law the driver was bound to do, the accident might not have happened, on account of the great distance to that side where the bank was, which caused the accident.—He further relied, that there was some evidence that the coachman was then driving with loose reins.

EYRE, Ch. J. :

This action is founded entirely in negligence. It has been said by the counsel for the plaintiff, that wherever a case happens, even where there has been no negligence, he would take the opinion of the Court, whether defendants circumstanced as the present, that is, coach-owners, should be liable in all cases, except where the injury happens from the act of God or of the King's enemies. I am of opinion the cases of the loss of goods by carriers and the present are totally unlike.—When that *case does occur, he will be told that carriers of goods are liable by the custom to guard against frauds they might be tempted to commit by taking goods entrusted to them to carry, and then pretending they had lost or been robbed of them ; and because they can protect themselves ; but there is no such rule in the case of the carriage of the persons.—This action stands on the ground of negligence alone.

[*535]

It appears by the evidence, that a person was on the roof: that undoubtedly alters the centre of gravity, and makes the carriage more liable to upset ; and if the construction of the carriage was such, that by putting a person on the roof it renders it unsafe, I think in such case the owners would be liable ; but that is not to be presumed to be so, without evidence.

It has been relied [on] that the coach was on the wrong side of the road ; but it is also in evidence that there was no other carriage at that time on the road. In such case, I am of opinion that nothing is imputable to the driver : when there was no other

ASTON
v.
HEAVEN.

carriage to interrupt him, he had a right to go on what part of the road he thought fit.

[*536]

The immediate cause of the accident is agreed on all hands; the question therefore depends on the consideration of Whether there was any negligence in the driver? It is said he was driving with reins so loose, that he could not readily command his horses: if that was the case, the defendants are liable; for a driver is answerable for the smallest negligence. But if this does not appear, and the accident appears to have arisen from any unforeseen *accident or misfortune, as from the horses suddenly taking fright; in such case the defendants are not liable.—It is for the jury to say, whether it proceeded from that cause or not.

The jury found a verdict for the defendants.

Adair, Serjt. Marshall, Serjt. and Lawes for the plaintiff.

Le Blanc, Serjt. and Bailey for the defendants.

1797.

Chelmsford
Lent Assizes.

HEATH, J.

[543]

FITCH v. FITCH.

(2 Espinasse, 543—545.)

Under a claim of right by a custom for all the inhabitants of a parish, evidence that a party claiming such right rented a tenement within the parish, which he used occasionally, though he did not actually reside within the parish, will support the custom.—Where a party claims a right to use a piece of ground belonging to another for a lawful purpose, he must use it for such purpose in a lawful and proper way, otherwise he will be considered a trespasser.

TRESPASS for breaking and entering the plaintiff's close at Steeple Bumstead in Essex.

The defendant justified, that all the inhabitants, &c. of the parish of Steeple Bumstead, had by custom a right to play at all times of the year, at all kinds of lawful games and pastimes in the said close. He then averred that he was an inhabitant; and that the trespass was committed in the exercise of a lawful pastime, &c. *prout ei bene licuit.*

There was a new assignment “of unnecessary and excessive damage,”—and not guilty pleaded.

The evidence as to the inhabitancy was, that the defendant's

father lived in an adjoining parish, but that he rented a butcher's shop in the parish of Steeple Bumstead, where he and the defendant came regularly twice a week, for the purpose of selling their meat.

FITCH
v.
FITCH.

It was contended by the plaintiff's counsel, that this was not such an inhabitancy as could justify the defendant under the title of an inhabitant within the custom, which should be confined to those only who dwelt within the parish.

Mr. Justice HEATH ruled that it was.—His Lordship said, it was like the case, where by custom a right was claimed of dipping at a well ; in which case, a defendant circumstanced as the present, could be justified in going there.—So of a seat in the parish church.

[514]

Upon the issue on the new assignment, the excessive and unnecessary injury, the evidence was, that the *locus in quo*, which was the soil and freehold of the plaintiff, having been let to run to grass, which the plaintiff had mowed, the defendants had gone into it, trampled down the grass, thrown the hay about, and mixed gravel through it, so as to render it of no value.

The counsel for the defendant contended, that if the right was established for the inhabitants to play at any games in the close, the defendants were justified in removal of any obstruction to the free exercise to the enjoyment of the right they claimed ; and so were justified in throwing the hay about in the manner stated.

HEATH, J. :

The custom appears to be established. The inhabitants have a right to take their amusement in a lawful way. It is supposed, that because they have such a right, the plaintiff should not allow the grass to grow. There is no foundation in law for such a position. The rights of both parties are distinct, and may exist together. If the inhabitants come in an unlawful way, or not fairly, to exercise the right they claim of amusing themselves, or to use it in an improper way, they are not justified under the

FITCH
v.
FITCH.
[*545]

custom pleaded, which is a right to come into the *close to use it in the exercise of any lawful games or pastimes, and are thereby trespassers.—His lordship therefore left it to the jury to say, Whether the defendant had entered the close in the fair exercise of a right, or in an improper way.

The jury found for the plaintiff, that it was used in an improper way.

Shepherd, Serjt. Garrow, and Marryat, for the plaintiff.

Palmer, Serjt. and Lawes for the defendant.

1797.
July 12.

JENDWINE v. SLADE.

(2 Espinasse, 572—573.)

[572]

The putting down the name of an artist in a catalogue as the painter of any picture, is not such a warranty as will subject the party selling to an action, if it turns out that he might be mistaken, and that it was not the work of the artist to whom it was attributed.†

THIS was an action brought to recover damages on the sale of two pictures, one of which was said to be a Sea-piece by Claud Loraine,‡ the other a Fair by Teniers, which the defendant had sold to the plaintiff as originals, when in fact they were copies.

The defence relied on was, that they were sold under a catalogue, not amounting to an absolute warranty, but upon which the buyer was to exercise his own judgment; and further, that a bill had been filed by the defendant, two years ago, to compel the plaintiff to complete the sale; to which he had put in no answer, but paid the money, and that therefore he could not now seek to rescind the contract after such acquiescence.

The plaintiff's counsel answered this objection, by insisting

† Compare *Power v. Barham* (1836) 4 A. & E. 473, where Lord ELLENBOROUGH left it to the jury whether the description "Canaletto" was a warranty, and they found for the plaintiff, and the Court of King's

Bench refused a new trial. See also *Gee v. Lucas* (1867) 16 L. T. N. S. 357.—R. C.

‡ Sic. Lord KENYON's opinion as to the *floruit* of the artists is curious, but extra-judicial.—F. P.

that the name of the artist put opposite any picture in a catalogue was a warranty; and if *the article sold did not correspond with it, it avoided the sale; and as to the transaction in respect to paying the money, that the plaintiff was deceived, but had brought his action as soon as he discovered the fraud.

JENDWINE
v.
SLADE
[*573]

Several of the most eminent artists and picture-dealers were called, who differed in their opinions respecting the originality of the pictures.

When the evidence was closed,

LORD KENYON said :

It was impossible to make this the case of a warranty; the pictures were the work of artists some centuries back, and there being no way of tracing the picture itself, it could only be matter of opinion whether the picture in question was the work of the artist whose name it bore, or not. What then does the catalogue import? That, in the opinion of the seller, the picture is the work of the artist whose name he has affixed to it. The action in its present shape must go on the ground of some fraud in the sale. But if the seller only represents what he himself believes, he can be guilty of no fraud. The catalogue of the pictures in question leaves the determination to the judgment of the buyer, who is to exercise that judgment in the purchase.

With respect to the bringing of the action, his Lordship added, that if any fraud has been committed in a sale, if the party comes recently after discovery of the deception, he is not barred by circumstances having taken place, such as were stated.

The cause was referred to arbitration.

Erskine and Lawes for the plaintiff.

Law and Fielding for the defendant.

K. B. (AT NISI PRIUS) MICHAELMAS TERM.

1797.
Nov. 29.
At Westminster.
[589]

DOE, EX DEM. PHILLIPS, Esq., v. BUTLER.†
(2 Espinasse, 589—590.)

When the commencement of a tenancy is not known, notice to quit at the expiration of the current year of the tenancy is sufficient.

THIS was an ejectment for premises in Crown Court, Moorfields.

The defendant rented premises of the lessor of the plaintiff, and the rent having been unpaid for a great length of time, this ejectment was brought to recover possession of the premises.

The premises in question were part of a considerable estate which the plaintiff had let; and the defendant not having taken them of the plaintiff, but of his tenant, it was not exactly known at what time his tenancy commenced; and the following notice to quit was therefore given:

“WILLIAM BUTLER,

“Take notice, that I hereby require you to quit and deliver up to me the possession of the house and premises you hold of me, situate in Rose-and-Crown Court, Moorfields, in the parish of St. Leonard, Shoreditch, in the county of Middlesex, at the end and expiration of the current year of your tenancy thereof, which shall expire next after the end of one half year from the date hereof. Dated this 20th day of June, 1796.

“J. PHILLIPS.”

[590]

The only question was, Whether this was a sufficient notice to quit, so as to entitle the lessor of the plaintiff to recover possession of the premises, no particular day being mentioned?

Lord KENYON held that it was sufficient; and the plaintiff accordingly had a verdict.

Erskine and *Marryatt* for the plaintiff.

Garrow for the defendant.

† See to similar effect *Doe d. Williams v. Smith*, 5 A. & E. 300.

FERGUSON *v.* ———.

(2 Espinasse, 590—591.)

1797.

Nov. 29.

A tenant from year to year is only bound to fair and tenantable repairs, so far as to prevent waste or decay of the premises; not to substantial and lasting repairs, such as new roofing, &c.

At Westminster.

[590]

THIS was an action to recover damages, for suffering an house of the plaintiff to be out of repair.

The case on the part of the plaintiff was, that the defendant had rented an house of him, as tenant at will, at a rent of 31*l.* per annum, which he had quitted. After the defendant had given up the possession, the house was found to be very much out of repair; and the plaintiff had an estimate made of the sum necessary to put it into complete and tenantable repair; which sum he sought to recover in the present action.

LORD KENYON said:

It was not to be permitted to plaintiff to go for the damages so claimed. A tenant from year to year is bound to commit no waste, and to make fair and tenantable repairs, such as putting in windows or doors that have been broken by him, so as to prevent waste and decay of the premises; but in the present case the plaintiff has claimed a sum for *putting on a new roof on an old worn-out house: this I think the tenant is not bound to do, and that the plaintiff has no title to recover it.

[*391]

K. B. (AT NISI PRIUS) HILARY TERM.

MOODY *v.* SURRIDGE.†

(2 Espinasse, 633—634.)

1798.

Feb. 10.

Malt is corn, within the meaning of the clause in the policies of insurance, "to be free from average," &c.

At Guildhall.

[633]

ASSUMPSIT on a policy of insurance.

The insurance was on a quantity of malt, shipped on account of the plaintiff.

† *Hart v. Standard Insurance Co.* (1889) 22 Q. B. D. 499, 501; 58 L. J. Q. B. 284.

MOODY
v.
SURREIDGE.

It was agreed, that the loss was an average loss only.

The defendant relied on the clause in the policy of insurance, "That corn, fish, &c. are to be free from average, unless general, or the ship be stranded;" and that this being an average loss, he was therefore not liable.

For the plaintiff it was contended, that malt did not come within the meaning of the term corn, in the policy of insurance, it being in a manufactured state.

[634]

Lord KENYON said, that the usual clause in policies of insurance to be free from average losses was, that underwriters should not be subjected to trifling losses in the case of articles insured, which were of a perishable nature: corn was of that description; but that it more strongly applied to the case of malt, which was certainly corn, though in a manufactured state, but which was of a still more perishable nature. He was therefore of opinion, that this loss came within the exception of the policy, and that the defendant was discharged.

The jury were of the same opinion, and found a

Verdict for the defendant.

Garrow and Park for the plaintiff.

Erskine and Gibbs for the defendant.

K. B. (AT NISI PRIUS) EASTER TERM.

1798.
May.

DOE, EX DEM. EYRE & ALT. v. LAMBLY.

(2 Espinasse, 635—636.)

[635]

Where a tenant on being applied to respecting the commencement of his holding, informs the party that it begins on a certain day, and notice to quit on that day is given at a subsequent time, he shall be bound by the information he so gave, and not be permitted to shew that in fact it began at a different time.

THIS was an action of ejectment, brought to recover the possession of a grass farm at Tottenham.

DOE
v.
LAMBLY.

The title of lessor of the plaintiff was as landlord of the premises, against the defendant as the tenant.

The plaintiff proved the holding by the defendant, and notice to quit at Lady-day.

The defendant denied that his term commenced at Lady-day, and relied on the insufficiency of the notice to quit.

In order to support his case and the notice, the plaintiff gave in evidence, That the lessor of the premises had been a lunatic ; and on his death they had been advertised to be sold. Mr. Corfield was attorney for the executors of the lunatics, and had been employed by them to sell them. Previous to their being advertised, Mr. Corfield, in order to ascertain what interest he had to sell, and how the premises were circumstanced, applied to the defendant Lambly, who was then the tenant in possession, to know what term he had in them, and when his holding commenced ; when the defendant informed him of his interest, and that his term commenced at Lady-day.

Lord KENYON intimating an opinion, that this was sufficient,

[636]

Garrow, for the defendant, said, that he was instructed that he could incontestably prove that the premises were not held from Lady-day ; and asked his Lordship to say, whether, in case he could prove that the information given to Mr. Corfield had been by mistake, it would enable him to go into evidence to shew the holding was not from Lady-day ?

Lord KENYON said, that he was of opinion the defendant had concluded himself by the information he had given to Mr. Corfield, and that he could not now set up a holding from a different day ; and that it made no difference whether the information so given, proceeded from mistake or design, as it had equally the mischief of leading the landlord into an error, and inducing him to proceed to recover the possession of the term, the commencement of which he had taken from the defendant's own information.

The plaintiff recovered.

Erskine and Holroyd for the plaintiff.

Garrow for the defendant.

1798.

May.

At Guildhall.

[637]

WATSON v. THRELKELD.

(2 Espinasse, 637—638.)

If a man allows a woman with whom he cohabits to assume his name, and in that name to contract debts, he shall be bound to pay for goods furnished to her at his house, even by a man who knew that the parties were not married.

ASSUMPSIT for goods sold and delivered.

Plea of *non-assumpsit*.

The action was brought to recover the amount of a quantity of linen drapery goods, furnished by the plaintiff to a woman who passed for the wife of the defendant.

The plaintiff proved the delivery to the woman at the defendant's lodgings: that he had himself chosen some of the articles for her: that she used his name; and was called Mrs. Threlkeld in his presence.

The defendant relied, that in fact this woman was not his wife, though she lived with him as such, but was a kept woman; and that that circumstance was known to the plaintiff when the goods were furnished. It was then pressed by the defendant's counsel, that however it had been held, that if a man permitted a woman to use his name, and pass for his wife, he thereby subjected himself to the payment of her debts; it had only gone to those cases where the tradesman had not known the real situation of the parties, but believed the woman to be actually married: that it was meant as a punishment on the man, who, by permitting a woman to use his name, had thereby given her a false credit, derived from his situation in life, as passing for his wife; but, in the present case, no such deceit was practised, no such false colours held out. The plaintiff knew the defendant was not married; so that he could not look to his credit, but to the woman's own; and that the plaintiff should therefore be nonsuited.

[*638]

LORD KENYON :

It is certain, that if a man has permitted a woman, to whom he was not married, to use his name and pass for his wife, and in that character to contract debts, he is liable for her debts;

and, I am of opinion, that he is liable, whether the tradesman who furnished the goods knew the circumstances to be so, or not. He gives her a credit from his name and cohabitation ; and it is not to be supposed that the tradesman could look to the credit of a woman of that description, and not to that of the man by whom she was supported. I shall hold the credit to be given to him, and that he is liable.

[WATSON
v.
THRELKELD.]

What, however, added his Lordship, I have said, must not be taken to be the case of a common strumpet, who may assume the name of a person, without his authority, from having casually known him ; it must be where the man permits the woman to assume his name, where she lives in his house, and is part of his family

The plaintiff had a verdict.

Erskine and——for the plaintiff.

Mingay for the defendant.

K. B. (AT NISI PRIUS) TRINITY TERM.

HAWKINS, ADM., v. BLEWITT.

(2 Espinasse, 663—665.)

1798.
July 4

To give effect to a *donatio mortis causâ*, the deceased must, at the time of the supposed gift, part with all dominion over the property.

[663]

TROVER for a box containing money and wearing apparel, brought by the plaintiff as administrator of one Hollowell, deceased.

The defendant pleaded the general issue, and relied on his right to hold the property as a *donatio mortis causâ* from the deceased.

The case, on the part of the plaintiff was, that the intestate in his last illness ordered the box to be carried to the house of the defendant, who was his aunt, and to be delivered to her ; but gave no other directions *respecting it, nor said any thing about giving it to her. But it was farther given in evidence, that, on

[*334]

HAWKINS the next day, the key was brought to the intestate, who desired
 BLEWITT. it to be taken back, saying, that he should want a pair of breeches
 out of it.

Gibbs, for the defendant, stated, that he was prepared with evidence to shew, that early in life the intestate had been distressed and in difficulties, from which he had been in some degree extricated, and otherwise was under considerable obligations to the defendant, to whom he always expressed his sense of them; and declared his intention of leaving her whatever property he should die possessed of. He then contended, that having thus intimated a foregone intention, the delivery of the box, in this manner, must be presumed to be made in pursuance of it, and be sufficient to establish her title to the property.

LORD KENYON :

I should be glad to give effect to the intention of the intestate, if it could be done consistently with the rules of law; but I am of opinion here, the defendant's title cannot be supported. In the case of a *donatio mortis causâ*, possession must be immediately given. That has been done here; a delivery has taken place; but it is also necessary that by parting with the possession, the deceased should also part with the dominion over it. That has not been done here. The bringing back the key by her the next morning to the intestate, and his declaration that he should want one of the articles of his apparel contained in it, are sufficient to shew that he had no intention of making any gift or disposition of the box. It seems rather to have been left in the defendant's care for safe custody, and was so considered by herself.

The plaintiff had a verdict.

Garrow and Eb. King for the plaintiff.

Gibbs for the defendant.

MARSH *v.* COLLNETT.(2 *Espinasse*, 665—666.)1798.
*July 13.**At Guildhall.*

[665]

Copies from the transfer books of stock kept at the Bank of England are admissible in evidence without production of the books, which, on grounds of public policy, ought not to be removed from the Bank. And, although the books were in court, the Judge, for the sake of example, refused to look at them.

So an attesting witness, although in court, will not be called to prove the execution of a deed thirty years old.

CASE for money had and received.

To prove the transfer of a parcel of stock by the plaintiff to the name of the defendant, the plaintiff's counsel offered in evidence a copy of the transfer, taken from the bank-book of the 3 per cents.

The bank-books were in court, but the copy above mentioned was only offered in evidence.

Gibbs, for the defendant, objected to it, and contended that the books themselves were the best evidence, and should be given in evidence, and that a copy was inadmissible.

Lord KENYON said, they were public books, which public convenience required should not be removed from place to place; and though the books were in court, he would not, for the sake of example, break in upon a rule, founded on that principle of public convenience, and require the production of the original, but admit a copy from them in evidence. *His Lordship added, he remembered a case before Mr. Justice YATES, where a deed of thirty years being produced in evidence, it appeared that the subscribing witness was living, and then actually in court. That learned Judge ruled, that he would not break in upon a rule of evidence so well established, as that deeds of thirty years standing proved themselves, by requiring the subscribing witness to be called, but would admit it without further proof.

[*666]

Erskine, Garrow and Manley for the plaintiff.

Gibbs and Marryat for the defendant.

1798.

*July 15.**At Guildhall.*

[666]

HAMMERSLEY ET AL. v. KNOWLYS, Esq.

(2 Espinasse, 666—668.)

Where a debtor makes a payment generally, without directing the appropriation, it shall be taken to be a payment on account of the subsisting debt, and on no other account.

ASSUMPSIT on a promissory note for 800*l.* made by the defendant, and drawn payable to Nathaniel Jefferys, or order, and by him indorsed to the plaintiffs.

Jefferys, the payee of the note, had been a jeweller, and kept cash with the plaintiffs as his bankers. Having provided the jewels for the marriage of the Prince of Wales, to the amount of 55,000*l.* the necessary advances on that occasion having involved him in difficulties, the defendant, *who was his brother-in-law, had lent him the note in question for his accommodation.

[*667]

In February, 1797, Jefferys paid the note in question, together with two others, into the plaintiffs' house as his bankers: on the 27th of that month these notes were due. Previous to that time Jefferys informed the plaintiff, that the note in question was an accommodation note, and requested him to hold it, and the other, over for some time, until his demand on account of the Princess of Wales' jewels was settled. Hammersley consented; and on the 27th of February, Jefferys paid into the house 2,000*l.* and said he would pay the balance when he received the rest of his money from the Prince's trustees; and also leave such a sum in their hands as would repay them for the favour done to him. This balance was then 802*l.* The money appeared to be paid in generally, and nothing was said as to its particular appropriation at the time. The plaintiffs carried this payment generally to account. Jefferys some time after became insolvent, and the plaintiff now sought to recover on this note, in order to cover the deficiency in the balance due by Jefferys to the house.

For the defendant it was contended, that the payment made by Jefferys on the 27th of February, should have been appropriated to the payment of the debt then subsisting, and of course to the discharge of the present note, together with the others, in specie, then lying unpaid in the banker's hands, as far as the

money paid in would go ; and that therefore the utmost that could be recovered against the defendant, or the makers of the other notes, would be the 302*l.* the balance then unpaid by the 2,000*l.*

HAMMERS-
LEY
v.
KNOWLYS.

LORD KENYON :

The grounds of the law as to payments is very clear. Where a person pays money on one account, it must be so appropriated, and cannot be changed : but the rule is not so strict as to say that the appropriation must be made at the time the payment is made ; it may be done at a future time, in pursuance of a fore-gone transaction : but where there is a subsisting demand between two parties, and the debtor makes a payment generally, it would be too much to say it was not a payment, but a deposit. It does not appear to me that it can be so taken, unless the parties agree that it should be so. That this was not so taken by the plaintiffs themselves appears, because it appears that after Jefferys became insolvent, Hammersley applied to him to set the note in question to the account of the general balance : I therefore think, that as the subsisting debt on the 27th of February, when Jefferys paid in the 2,000*l.* on account, arose on the note in question, and the two others mentioned in the case, the plaintiff was bound to ascribe it to that account.†

[668]

*The jury found a verdict for 302*l.* only.*

Garrow and Lawes for the plaintiff.

Erskine for the defendant.

† See *Devaynes v. Noble* (*Clayton's case*) 1 Merivale, 572, 603, 611 ; *In re Sherry* (1884) 25 Ch. D. 692, 53 L. J. Ch. 404, 50 L. T. 227 ; *Huncock v. Smith* (C. A. 1889) 41 Ch. D. 456, 58 L. J. Ch. 725, 61 L. T. 341.

1798.

*Maidstone
Summer
Assizes.*

KENYON, C.J.
and
BULLER, J.

[675]

THE KING v. WATTS.†

(2 *Espinasse*, 675—676.)

Where a vessel was sunk in a navigable river, by accident or misfortune, an indictment cannot be maintained against the owner for not removing it.

THIS was an indictment against the defendant, preferred by the city of London, for a nuisance on the river Thames.

The indictment charged, "That the defendant, being the owner of a certain ship which had been sunk in the river Thames, suffered and permitted the said ship to remain and continue there, to the obstruction of the navigation of the said river, and of persons passing, repassing, and navigating on the said river," &c.

The case, as stated by the prosecutor's counsel was, That the defendant's ship coming up the Thames, was run down and sunk by an outward-bound Indiaman; that she became a complete wreck, in which state she was at the time of the indictment, and had the effect complained of in the *indictment.

[*676]

Upon the opening of the case, Lord KENYON expressed his opinion that the indictment could not be sustained. His Lordship said, that the grievance which was the object of the present indictment, had been occasioned, not by any default or wilful misconduct of the defendant, but by accident and misfortune; and that it would be adding to the calamity to subject the party to an indictment for what had proceeded from such causes, against which he could not guard, or which he could not prevent.

Shepherd, Serjt. for the prosecution, contended, That though the defendant was not punishable for causing the nuisance, it having arisen from the accident stated, it still was his duty to have removed it, and that he was therefore liable for not having done so.

Lord KENYON said, That perhaps the expense of removing the vessel might have amounted to more than the whole value of the

† See *Davis v. Saunders* (1770) App. Ca. 743, 47 L. J. Q. B. 193, 37 2 Chitty, 639; *River Wear Commissioners v. Adamson* (H. L. 1877) 2 L. T. N. S. 543.

property ; he was therefore of opinion that the offence charged was not of that description for which an indictment could be supported, and he therefore directed an acquittal.

THE KING
v.
WATTS.

Shepherd, Serjt. the Common Serjeant, *Silvester* and *Knowlys* for the prosecution.

Palmer, Serjt. and *Pitcairn* for the defendant.

K. B. (AT NISI PRIUS) MICHAELMAS TERM.

WRIGHT v. BARNARD.

(2 *Espinasse*, 700—702.)

1798.
Dec. 11.

A notarial copy of the survey of a ship condemning her as not being worth repairing, is only evidence of the fact of her having been condemned, not of the particular defects on which the condemnation was grounded.

[700]

THIS was an action on a policy of insurance on the ship *Silvina*, from Norfolk in Virginia to the port of London. The loss stated in the declaration was by the perils of the sea.

The defence relied on was, that the ship was not seaworthy at the time she sailed.

[701]

It was proved on the part of the plaintiff by the person who had effected the insurance, that he had laid the letter of orders, which he had received from the plaintiff, before the defendant and the other underwriters. In that letter it was stated, that the ship had been a condemned ship, but that previous to her voyage she had undergone a complete repair, and that the captain was satisfied with it before she sailed.

The defendant had filed a bill of discovery, and for an injunction in the Court of Exchequer ; and by rule made by that Court, it was ordered that a notarial copy of the condemnation of the ship should be admitted in evidence.

The condemnation had been made by several ship-carpenters in America : it stated the particular defects of the ship, her

WRIGHT
v.
BARNARD.

timbers, &c. specifying them at large ; and it then concluded, that the ship was condemned, as not being worth repairing.

The captain of the ship was called by the plaintiff, and proved that the ship had undergone a complete repair under his direction ; and he mentioned the particulars of the repairs which had been done ; with which he declared himself to have been perfectly satisfied, and that the ship was seaworthy.

Gibbs, for the defendant, produced the notarial copy of the condemnation, and proposed to give it in evidence, in order to shew by it in what particulars the ship had been defective and out of repair ; so that what had been done, according to the relation of the captain, was insufficient, and that the ship was not thereby rendered seaworthy.

This was objected to on the part of the plaintiff.

LORD KENYON :

I am of an opinion, that the condemnation is inadmissible to the extent contended for. Sitting in a court of law, I can receive no evidence but what comes under the sanction of an oath. The evidence now offered is the report of certain ship-carpenters, made *ex parte* ; and without the obligation of an oath I cannot receive it. I will admit the condemnation as evidence of the fact, that a condemnation had taken place, but no farther.

[702]

The plaintiff had a verdict.

Erskine, Park and Espinasse for the plaintiff.

Gibbs and Giles for the defendant.

DOE, EX DEM. HOLLINGSWORTH, v. STENNETT.

(2 Espinasse, 717—719.)

1799.
Feb. 15.At Westmin-
ster.

[717]

If a tenant, whose lease is expired, is permitted to continue in possession, pending a treaty for a further lease, he is not a tenant from year to year; but so strictly at will, that he may be turned out of possession without notice. *Aliter*, if he has continued in possession a year, or rent has been received.

THIS was an action of ejectment.

The defendant held the premises as tenant to the plaintiff, under a lease; which expired on the 24th of June, 1798.

The demise laid in the declaration in ejectment, was on the 1st of July, in the same year.

A notice to quit was proved, dated the 17th of August following. The ejectment was of Michaelmas Term.

For the defendant, it was relied, as a defence to the action, That, at the expiration of the lease, the parties had entered into a new agreement for a further term of seven years. This was however, by parol, and void *under the Statute of Frauds; but it was contended, that the defendant, having been permitted to continue as tenant after the expiration of his lease, he should be taken to continue as tenant from year to year; and so the ejectment was not maintainable, it being brought before the year expired.

[*718]

LORD KENYON asked, If the defendant had been allowed to continue tenant for a year? or if the lessor of the plaintiff had received any rent from him? Being answered in the negative, he said, he should not hold this to be a tenancy, unless strictly at will: that the Statute of Frauds was decisive; it being thereby declared, that all agreements for a longer term than three years should be void, where there was no note in writing; and it had been held, that such parol agreement was not good even for three years. The agreement being therefore void, the defendant was in by no title of tenancy whatever; but held at the will of the lessor, in the strictest sense of the word.

DOE
v.
STENNETT.

The defendant's counsel then relied, That the plaintiff could not recover in this ejectment, on the ground that the defendant was in possession by the lessor of the plaintiff's permission, after the time of the demise to the plaintiff, so that at that time he could not be a trespasser: and cited *Goodtitle ex dem. Galloway v. Herbert*, 4 Term Rep. 680.

To prove this, they gave in evidence, that such an agreement as is before stated, had been entered into between the defendant and the lessor of the plaintiff: that leases had been actually prepared in pursuance of it; and the 31st of July fixed for the execution of them: and that the defendant had been always ready to have done his part, and accepted the lease.

[719] Lord KENYON ruled, that the defendant must be deemed to be in by the lessor of the plaintiff's permission till the treaty for the lease was at an end, which, at soonest, was not till the 31st of July; so that on the 1st of July, the day laid in the declaration, he was not a trespasser; and directed a nonsuit.†

Garrow and Reader for the plaintiff.

Gibbs and Wigley for the defendant.

NICHOL & ALT. v. MARTYN.

(2 *Espinasse*, 732—734.)

[732]

A servant, while in his master's service, may solicit business from his customers for himself, when his service is at an end, and he sets up on his own account. It is not actionable to induce a servant to leave at the expiration of his term of service.

THIS was a special action on the case, against the defendant, for seducing the plaintiffs' customers.

The plaintiffs were wholesale ironmongers, who carried on a very extensive business; the defendant had been employed by them as their rider or traveller, to get orders in the course of their business; and the foundation of the action was, That the defendant, who at the time of bringing the action was in the same line of business with the plaintiffs, had, during the time

† Vid. *Doe ex dem. Martin v. Watts*, 7 T. R. 83, 4 R. R. 387.

that he was in their employment, endeavoured to seduce the several country shopkeepers who were in the habit of dealing with the plaintiffs, to leave off dealing with them, and to transfer their business to the defendant.

NICHOL
v.
MARTYN.

To prove the plaintiffs' case, they called some of those country *shopkeepers. Their evidence proved that the defendant on his last coming to their shops as rider to the plaintiffs, and on their business, had told them that he was himself going into the same business with the plaintiffs after Christmas, and would then be obliged to them for an order on his own account.

[*733]

It appeared, however, on the cross-examination of those witnesses, that he took the orders regularly for the plaintiffs on that journey, and that they were executed on the plaintiffs' account; and that no solicitation was used by the defendant for any order at that time, which might have been supplied by the plaintiffs.

It was also admitted, that in fact, the time of the defendant's engagement to serve the plaintiffs, expired at the beginning of the year; so that, in truth, in the month of March he would have been completely his own master.

LORD KENYON, Chief Justice :

The conduct of the defendant in this case, may perhaps be accounted not handsome; but I cannot say that it is contrary to law. The relation in which he stood to the plaintiffs, as their servant, imposed on him a duty which is called of imperfect obligation, but not such as can enable the plaintiffs to maintain an action. A servant while engaged in the service of his master, has no right to do any act which may injure his trade, or undermine his business; but every one has a right, if he can, to better his situation in the world; and if he does it by means not contrary to law, though the master may be eventually injured, it is **damnum abs. injuria*. There is nothing morally bad, or very improper in a servant, who has it in contemplation at a future period to set up for himself, to endeavour to conciliate the regard of his master's customers, and to recommend himself to them, so as to procure some business from them as well as others. In the present case, the defendant did not solicit the present orders of the customers;

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v.
MARTYN.

on the contrary, he took for the plaintiffs all those he could obtain : his request of business for himself was prospective, and for a time when the relation of master and servant between him and the plaintiffs would be at an end.

It was suggested in the course of the cause, that the defendant had seduced some of the servants of the plaintiff to quit their service, and to enter into his when he went into business.

Upon that point Lord KENYON said, That seducing a servant, and enticing him to leave his master while the master by the contract had a right to his services, was certainly actionable ; but that to induce a servant to leave his master's service at the expiration of the time for which the servant had hired himself although the servant had no intention at the time of quitting his master's service, was not the subject of an action.

The plaintiffs were nonsuited.

Erskine, Garrow, Gibbs, and Best for the plaintiffs.

Law, Adams, and Maryat for the defendant.

K. B. (AT NISI PRIUS) EASTER TERM.

NEWBY v. WILTSHIRE.†

(2 Espinasse, 739—742.)

1795.

[739]

A master is not liable to reimburse the parish for the cure of a servant meeting with an accident in his service.

ASSUMPSIT for money paid, laid out, and expended for the defendant's use, which came on to be tried at the assizes for the county of Cambridge ; when the following case was reserved.

† This case is reported by Espinasse (vol. ii. p. 739), from a note not before in print, in order to correct a *nisi prius* ruling of Lord KENYON in *Scarman v. Castill*, reported 1 Esp. 270. The decision of the King's Bench in the case here reported is confirmed by the judgment of the

Common Pleas in *Wennall v. Adley* (1802) 3 Bos. & P. 247, reported 6 R. R. 780. The common law doctrine in the headnote must now be taken subject to the statutory enactment of the Employers' Liability Act, 1880.—R. C.

The case stated, That the defendant, a farmer, sent his waggon in May, 1784, to Cambridge; and in returning, a boy that had been sent with it, fell from the shafts and broke his leg; that the boy could not be removed out of the parish where the accident happened, on account of the danger it might occasion; that the plaintiff was overseer of the parish where the accident happened, and took the charge of getting the boy cured upon himself; that it was necessary to cut off the leg; and the overseer expended in and about the cure 32*l.*; that afterwards the boy served the remainder of the year with his master, and the action was brought to recover from the defendant the expenses of the boy's cure.

NEWBY
v.
WILTSHIRE.

Sayer for the plaintiff, contended that the action was well brought, and insisted first, that the master was generally liable for the cure of all accidents that might happen to his servant while in his service. 2ndly, That he was liable upon the particular circumstances of the case. The parish had nothing to do with accidents of this sort; and a master could not discharge a servant in his sickness, but was bound to maintain him as long as it lasted. *Rex v. Christchurch*, Bur. Set. Cas. 158. The master might have a particular action for the beating of his servant, upon the principle of the loss of service; and in 2 Bulst. 332, an action was brought by a master against a surgeon for prolonging the cure of his servant. The fair inference is, that the master is liable generally to bear the expenses. He cited Stra. 99.—2ndly, The master was bound to answer the same under the particular circumstances of this case, and cited *Watson v. Turner*, Bull. N. P. 281.

[740]

Wilson for the defendant:

This action is not maintainable by one parish officer only. There was no order made to remove the pauper: the action ought to have been brought by the boy himself, or by the surgeon who cured him. If the parish is liable, the master is not; and there is nothing in the case that will amount to an express undertaking on the part *of the master: his ability to maintain the servant is out of the question, as it would be impossible in a case of this kind to ascertain that; and the question

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— 3. Fraudulent preference of creditor.—The acceptor of a bill of exchange two days before the expiration of the time for which the bill was originally drawn, called upon the indorser and informed him privately that he was insolvent; the indorser insisted on being paid the amount of the bill, offering at the same time to become security to the creditors for so much as the estate should produce, whereupon the acceptor paid it, and four days after became bankrupt; it also appeared that the bill had been altered so as to make it fall due before this transaction, but without the defendant's knowledge. Held that this was sufficient proof of fraudulent preference to defeat the payment of the bill. *Singleton v. Butler* 593

— 4. Specific appropriation.—A. abroad commissions B. in London, to send him foreign coin; with particular directions as to the manner and times of sending it; and remits bills; which B. discounts; and, the coin required not being to be had in England, sends two remittances, not equal to the amount of A.'s bills, to Lisbon, for the purpose of procuring it: with directions, if it cannot be had, to return bills. The coin not being obtainable, bills, nearly to the amount of the remittance to Lisbon, not indorsed by the correspondent there, are returned; and, B. in the interval becoming bankrupt, are received by his assignees. A. was held entitled to follow those bills under the particular circumstances: the Lord Chancellor expressing much doubt, whether the same would hold in the case of a remittance to buy goods in the way of trade. *Sayers, Ex parte* 17

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— 2. **Penalty.**—By articles of agreement between the plaintiff and defendant it was agreed on the part of the former that he should pay the latter so much per week to perform at his theatres, with her travelling expenses of removing from one theatre to another except extra baggage; and on the part of the defendant, that she should perform at the theatres such things as she should be required by the plaintiff, and attend at the theatre beyond the usual hours on any emergency and at rehearsals or be subject to such fines as are established at the theatres, and be at the theatre half an hour before the performances begin, and abide by the regulations of the theatres and pay all fines; and it was agreed by both parties that “either of them neglecting to perform that agreement should pay to the other 200*l.*” Assumpsit upon this agreement stating several breaches, and concluding to the plaintiff’s damage of 200*l.*—Held that the sum mentioned in the agreement was in the nature of a penalty, not of liquidated damages. *Astley v. Weldon* 618

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out interruption from himself, or any person claiming under him; and, lastly, that he, his heirs, and assigns, and all persons claiming under him, should make further assurance. Held, that the general intervening words, "full power, &c. to convey," were either part of the preceding special covenant; or, if not, that they were qualified by all the other special covenants against the acts of himself and his heirs. *Browning v. Wright* 521

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In the case of Lord Somerville, of two acknowledged domiciles, the family seat in Scotland, and a leasehold house in London, upon the circumstances the former, which was the original domicile, prevailed.

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The Court will not perpetuate testimony of a right, which may be immediately barred by the defendant. *Lord Dursley v. Fitzhardinge Berkeley* 285

— 2. A barrister cannot be called as a witness to prove what was stated by him on a motion before the Court. *Curry v. Walter* . . . 743

— 3. Copies from the transfer books of stock kept at the Bank of England are admissible in evidence without production of the books, which, on grounds of public policy, ought not to be removed from the Bank. And, although the books were in Court, the Judge, for the sake of example, refused to look at them.

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And see **Witness.**

EXECUTOR.—Executor discharged from a loss under favourable circumstances. *Bacon v. Bacon* . . . 52

And see **Will.**

EXTENT. *See* Mortgage, 1.

FISHERY.—*Prima facie* every subject has a right to take fish found upon the seashore between high and low water-mark; but such general right may be abridged by the existence of an exclusive right in some individual. *Quære.* If there be a *prima facie* right in the subject to take fish-shells found on the sea-shore between high and low water-mark? *Bagott v. Orr* . 668

FORE-SHORE. *See* Fishery.

FRAUD.—1. It is an old head of equity, that if a representation is made to a man, going to deal on the faith of it in a matter of interest, the person making the representation, knowing it false, shall make it good; and the jurisdiction assumed by courts of law in such cases will not prevent relief in equity.

It is not a general rule in equity, that a second mortgagee, who has the

title deeds, without notice of a prior incumbrance, shall be preferred: negligence alone will not postpone the first: it must amount to fraud. *Evans v. Bicknell* 245

— 2. Of trustee. *See* Trustee, 1.

FRAUDS, STATUTE OF—1. A bill of parcels in which the vendor's name is printed, delivered to the vendee at the time of an order given for the future delivery of goods, seems to be a sufficient memorandum of the contract within the Statute of Frauds. At all events, a subsequent letter written and signed by the vendor referring to the order, may be connected with the bill of parcels, so as to take the case out of the statute. *Saunderson v. Jackson* 5:0

— 2. Signature.—An agreement beginning "I A. B." though not otherwise signed by the party, is good within the Statute of Frauds. *Knight v. Crockford* 729

GIFT. *See* Donatio mortis causa.

GOODS—1. Liability for.—If a man allows a woman with whom he cohabits to assume his name, and in that name to contract debts, he shall be bound to pay for goods furnished to her at his house, even by a man who knew that the parties were not married. *Watson v. Threlkeld* . . . 760

— 2. Warranty of safe delivery. *See* Carrier, 3.

— 3. Lien. *See* Lien.

And see Sale of Goods.

HABEAS CORPUS. *See* Criminal Law, 2.

HIGHWAY—Repair.—If the commissioners under an enclosure Act set out a private road for the use of the inhabitants of nine parishes, directing the inhabitants of six of those parishes to keep it in repair, no indictment can be supported against the latter for not repairing it, it not concerning the public. *Rez v. Richards* 489

ILLEGAL CONTRACT. *See* Contract, 1.

ILLEGITIMATE CHILD. *See* Will, 16, 28.

IMPRISONMENT—Justifiable detention.—A private person may justify breaking and entering the plaintiff's house and imprisoning his person, to prevent him from committing murder on his wife. *Handcock v. Baker* 587

INCLOSURE.—If an Act of Parliament for enclosing and allotting the common and waste land of a parish through which a navigable river flows, empowers commissioners to set out such public and private roads and ways as they shall think necessary, and direct that all roads and ways not so set out shall be deemed part of the lands to be allotted; an ancient towing path upon the bank of the river though not set out by the commissioners, still subsists, for it is not within their jurisdiction. *Simpson v. Scales* . . 685

INDICTMENT. *See* Arbitration, 2, and Accident.

INFANT.—Personal property of an infant ordered to be laid out in the purchase of land; though there was no authority in the will for changing the nature of the property; but it was ordered that the estate purchased should be conveyed in trust for the infant, his executors and administrators, till he should attain twenty-one, and afterwards for him and his heirs. *Lord Ashburton v. Lady Ashburton* 201

— 2. Action ex delicto.—An action for money had and received, will lie against an infant, to recover money which he had embezzled.

Infants are liable to actions *ex delicto*, but not to actions *ex contractu*, unless they arise from fraud. *Bristow v. Eustman* 728

INFANT—3. **Liability for trade debts.**—Where an infant carries on trade, an action is not maintainable against him for work done for him in the course of that trade which he so carries on, on his own account, and whereby he gains his living. *Dilk v. Keighley* 747

— 4. **Liability of father for necessaries.**—Where a father gives his son a reasonable allowance for his expenses, the son is solely liable; neither shall the father be liable even for necessaries. *Crantz v. Gill* 746

INJUNCTION.—Injunction to restrain the landlord from cutting ornamental trees in a lawn during the term, upon his conduct; amounting to a consent to the tenant's plan of improvement, laying out the lawn, &c.

Sending a surveyor to mark out trees is a sufficient ground for an injunction. *Jackson v. Cator* 144

INSURANCE (FIRE). See Vendor and Purchaser, 4.

INSURANCE (MARINE)—1. **Apportionment of risk.**—Where there is a joint insurance directed to be made on a ship and cargo, and part only attaches, the assured is only entitled to recover proportionately. *Amery v. Rogers* 731

— 2. **Capture and re-purchase—Not total loss.**—Where a ship insured has been captured and brought into a neutral port, and sold by the captors, and the captain bought her for the benefit of the owners, they shall only be entitled to recover on a policy the sum paid by the captain, and what may be expended in her outfit, and cannot recover for a total loss. *M' Masters v. Shoolbred* 735

— 3. **Construction of policy.**—Malt is corn within the meaning of the clause in the policies of insurance, "to be free from average," &c. *Moody v. Surridge* 757

— 4. **Illegal contract.**—The premium paid on an illegal insurance to cover a trading with an enemy cannot be recovered back, though the underwriter cannot be compelled to make good the loss. *Vandyck v. Hewitt*. 516

— 5. **Inability to complete voyage—Average.**—Where a ship's bottom has, during the voyage insured, been taken by the worm, in consequence of which she is incapable of proceeding on her voyage, and is condemned, this is not a loss by perils of the sea, within the meaning of the policy.

In a policy on cargo an exception of average loss under per cent., has reference to the amount of risk at the time of the loss, and not to a full cargo taken in afterwards. *Rohl v. Parr* 741

— 6. **Joint interest in cargo.**—In a declaration on a policy of insurance the plaintiff averred that Messrs. H. at the time of effecting the policy and at the time of the loss, were interested in the cargo which was the subject of the insurance "to a large amount, to wit, to the amount of all the money ever insured thereon;" at the trial it appeared that previous to effecting the policy, Messrs. H. had admitted another mercantile house to a joint concern in the cargo insured. Held that the averment was supported by the evidence. *Page v. Fry* 583

— 7. **Liability for damage during discharge.**—Insurance on goods from A. to B. "until they should be there discharged and safely landed;" on their arrival at B. the merchant to whom the goods belonged, employed and paid a public lighter to land them, and the goods being damaged in the lighter without negligence, the underwriters were held liable for the loss. *Hurry v. The Royal Exchange Assurance Company* 639

— 8. **Return of premium.**—Policy on the *Ceres* "at and from Oporto to Lynn, with liberty to touch at any ports on the coast of Portugal to join convoy particularly at Lisbon; at 12 guineas per cent. to return 6l. if she sail with convoy from the coast of Portugal and arrive." The *Ceres* sailed

from Oporto with a sloop and cutter appointed to protect the trade of that place to Lisbon, from whence it was to proceed with the Lisbon trade under a larger convoy for England. On the way from Oporto to Lisbon the fleet was dispersed by a storm, and the *Ceres* judging for the best, run for England and arrived. Held that the assured was entitled to a return of premium. *Audley v. Duff* 549

INSURANCE (MARINE)—9. Return of premium.—In an action on a policy of insurance, with a count for money had and received, if the defendant establish as a defence that the risk never commenced, the plaintiff is entitled to a verdict for the premium, though no demand of premium was made by his counsel in opening the case. *Penson v. Lee* 614

— 10. Termination of risk.—Where a ship is insured "to — and until moored twenty-four hours in safety," the risk terminates on the ship arriving and voluntarily remaining so moored at any port within —. *Leigh v. Mather* 740

— 11. Unseaworthiness—Evidence.—A notarial copy of the survey of a ship condemning her as not being worth repairing, is only evidence of the fact of her having been condemned, not of the particular defects on which the condemnation was grounded. *Wright v. Barnard* 767

— 12. Warranty—Convoy.—A warranty to depart with convoy is not complied with, unless sailing instructions be obtained before the ship leaves the place of rendezvous, if by due diligence of the master they can be then obtained. *Anderson v. Pitcher* 565

— 13. Warranty of neutrality.—Where a policy of insurance has been made on goods on board a certain ship "warranted a Dane" (Denmark being a neutral country), the warranty is not falsified by a sentence of a foreign court of Admiralty condemning the ship for navigating contrary to the ordinances of the belligerent state, to which the neutral country (Denmark) had not assented. *Pollard v. Bell* 404

— 14. Goods may be insured, though purchased with the proceeds of a former illegal cargo. An insurance on goods on board a ship for a particular voyage is legal, though she may have done some act in a former voyage for which she was liable to seizure.

A warranty of neutrality in a policy of assurance, is not falsified by a sentence of a foreign court of Admiralty condemning a ship for navigating contrary to the ordinances of that belligerent state to which the neutral country had not assented. *Bird v. Appleton* 468

JURISDICTION—A court of equity has jurisdiction to order the delivery up of securities, and to give other relief in respect of a transaction which is null and void at law, although no special equitable ground for such interference is shewn. *Byne v. Vivian* 126

LANDLORD AND TENANT—1. Lease—Breach of covenant.—To an action by a lessor for a breach of covenant on an indenture of lease in not repairing, &c. the lessee cannot plead in bar that the lessor had only an equitable estate in the premises; for that is tantamount to a plea of *nil habuit in tenementis*. But the lessee is not estopped from shewing that the lessor was only seised in right of his wife for her life, and that she died before the covenant broken, because an interest passed by the lease. *Blake v. Foster* 419

— 2. Lease—Expiration of term—Liability of tenant for rent.—When a lease is expired, the tenant continues liable to the rent unless he delivers up complete possession of the premises, or the landlord accepts another in his room. *Harding v. Crethorn* 719

— 3. Lease—Renewal.—Construction of a covenant for renewal under the like covenants, &c.; that it was not for perpetual renewal: the Courts leaning against that construction, unless clearly intended.

Legal instruments not to be construed by the acts of the parties. *Moore v. Foley* 270

LANDLORD AND TENANT—4. Notice to quit.—Where a letting is by the month, a month's notice is sufficient to determine the tenancy. *Doe d. Parry v. Hazell* 722

— 5. Notice to quit.—Where rent is reserved quarterly, it does not dispense with the necessity of six months' notice to quit. But when three months' notice only were given, and the lessor neither expressed an assent or dissent to the admitting it, and took the rent up to the time when the tenant quitted, it shall be taken as a waiver of the regular notice to quit, and an acquiescence on the part of the lessor. *Shirley v. Newman* 737

— 6. Notice to quit.—When the commencement of a tenancy is not known, notice to quit at the expiration of the current year of the tenancy is sufficient. *Doe d. Phillips v. Butler* 756

— 7. Notice to quit.—Where a tenant on being applied to respecting the commencement of his holding, informs the party that it begins on a certain day, and notice to quit on that day is given at a subsequent time, he shall be bound by the information he so gave, and not be permitted to shew that in fact it began at a different time. *Doe d. Eyre v. Lambly* 758

— 8. Public-house.—Covenant not to assign without leave of landlord is consistent with a warranty that the lease (being that of a public-house) contains none but fair and usual covenants. *Morgan v. Slaughter* 715

— 9. Repairs.—A tenant from year to year is only bound to fair and tenantable repairs, so far as to prevent waste or decay of the premises; not to substantial and lasting repairs, such as new roofing, &c. *Ferguson v. —* 737

— 10. Specific performance of agreement for lease.—Parol evidence admissible in opposition to a specific performance of a written agreement upon the heads of mistake or surprise as well as of fraud; and upon such evidence the bill was dismissed. Another bill for a specific performance of the agreement, corrected according to the same evidence, contradicted by the answer, was also dismissed. *The Marquis Townshend v. Stangroom. Stangroom v. The Marquis Townshend* 312

— 11. Tenant at will.—If a tenant, whose lease is expired, is permitted to continue in possession, pending a treaty for a further lease, he is not a tenant from year to year; but so strictly at will, that he may be turned out of possession without notice. *Aliter*, if he has continued in possession a year, or rent has been received. *Doe d. Hollingsworth v. Stennett* 769

— 12. Waste.—Encroachments by the tenant on the waste, do not belong to the landlord. *Doe d. Cololough v. Mulliner* 744

— 13. Waste—Encroachment by tenant.—Same point as last case. *Doe d. Challnor v. Davies* 745

And see Covenant.

LEASE—Assignment.—A. having agreed to purchase of B. the remainder of a term, the latter delivered to him the lease, in order that he might get an assignment made out; A. then obtained an enlargement of the term from the original landlord, and refused to accept an assignment or pay the full price agreed on, because B.'s under-tenant had removed some fixtures. Held that B. might insist on A. accepting the assignment, and after demand and refusal of the lease might maintain trover for it. *Parry v. Frame* 651

LIBEL—1. Fair comment.—The editor of a public newspaper may fairly comment on any place of public entertainment; nor shall such a paragraph be deemed a libel. *Dibdin v. Swan* 717

— 2. Privilege.—If a member of Parliament publish in the newspapers his speech as delivered in Parliament, and it contains charges of a

slandrous nature against an individual, an information will lie for a libel; though had the words been merely delivered in Parliament, they would be punishable in the Courts at Westminster.

In a criminal prosecution where the defendant calls no witnesses, the counsel for the prosecution are not entitled to a reply. *Rex v. Lord Abingdon* 733

LIEN—1. **Wharfinger**.—A wharfinger has a lien on goods brought to his wharf for the balance of a general account. *Naylor v. Mangles* . . . 722

— 2. An agent who has a lien on goods in his possession, if he afterwards deliver them to a ship carrier to be conveyed on account and at the risk of his principal, though unknown to the carrier, cannot recover his lien by stopping the goods *in transitu*, and procuring them to be re-delivered to him by virtue of a bill of lading signed by the carrier in the course of his voyage. *Sweet v. Pym* 497

LUNATIC.—Access to a lunatic by a person entitled upon the death of the lunatic in default of appointment by her, to see, whether she was in a state to exercise the power, refused. *Lyttleton, Ex parte* 203

And see Practice, 2.

MAINTENANCE. See Will, 5.

MAJORITY—Of members. See Corporation, 1.

MARRIED WOMAN.—A *feme covert* cannot contract and be sued as a *feme sole*, even though she be living apart from her husband, having a separate maintenance secured to her by deed. *Marshall v. Rutton* . . . 448

MASTER AND SERVANT.—1. A servant, while in his master's service, may solicit business from his customers for himself, when his service is at an end, and he sets up on his own account. It is not actionable to induce a servant to leave at the expiration of his term of service. *Nichol v. Martyn* 770

— 2. A master is not liable to reimburse the parish for the cure of a servant meeting with an accident in his service. *Newby v. Wiltshire* . . 772

— 3. **Limit of presumed authority**.—Where a servant quits sight of the object for which he is employed, and, without having in view his master's orders does that which his malice suggests, he no longer acts in pursuance of the authority given him, and the master is not answerable for the act. *M'Manus v. Crickett* 518

MONEY—**Recovery of**.—Where a party sued on a claim pays it voluntarily, he cannot recover the money in *assumpsit*, though at the time he pays it, he declares that he pays it without prejudice to his right to recover. *Brown v. M'Kinally* 739

MORTGAGE—1. **Equity of redemption**.—An equity of redemption may be taken under an extent. *Rex v. De La Motte* 714

— 2. **Redemption**.—Creditors under a deed of trust cannot have a decree for redemption against a mortgagee; unless a special case; as collusion; that the trustee refuses, &c. In this case the bill by the creditors prayed, not a redemption but a sale; to which the mortgagee would not consent; but submitted to be redeemed: and the bill was dismissed. *Troughton v. Binkes* 401

— 3. **Proportion of tolls**.—The trustees under a Turnpike Act, being empowered to demise or mortgage the tolls "or any part thereof and the turnpikes and toll-houses for collecting the same," demised to one of several mortgagees, such proportion of the tolls arising from the road and of the toll-houses and toll-gates for collecting the same as the sum advanced by him bore to the whole sum raised on the credit of the tolls the mortgagee brought ejectionment

for the toll-houses and toll-gates, in order to repay himself the interest due to him. Held that he might well maintain his action, notwithstanding a clause in the Act that all the mortgagees should be creditors upon the tolls in equal degree. *Doe d. Banks v. Booth* 575

And see Fraud, Trustee, 1.

MORTMAIN. *See Will, 27, 29.*

NEGLIGENCE—Of trustee. *See Trustee, 1.*

NEUTRALITY—Warranty of. *See Insurance (Marine), 13, 14.*

NEWSPAPER REPORT. *See Libel.*

NUISANCE. *See Accident.*

OFFICER—Notice of action.—If an officer seize goods in obedience to the warrant of a magistrate, whether that warrant be legal or not, he cannot be sued without a previous demand of a copy and perusal of the warrant according to 24 Geo. II. c. 44. If the warrant be to seize "stolen goods," and the officer seize goods which turn out not to have been stolen, he is still within the protection of 24 Geo. II. c. 44. *Price v. Messenger* 559

PARISH. *See Pew.*

PARLIAMENT—Privilege of member of. *See Libel, 2.*

PAROL EVIDENCE. *See Evidence, 7, 8.*

PARTNERSHIP—1. Property bought in the name of a partner with money belonging to the firm, held to be the separate estate of the partner, the purchase money with interest having been charged to the partner's account with the firm. *Smith v. Smith* 22

— **2. Arbitration—award.**—Money paid by one of two partners for the other on account of losses incurred by them on partnership insurances, cannot be recovered in an action brought by him against the other partner. And if this with other causes of dispute between the two be referred to an arbitrator who awards a sum due from one to the other for money so paid, the Court will set aside that part of the award. *Aubert v. Maze* 624

— **3. Bill of Exchange—Authority.**—Two (of three) partners, who had contracted a debt prior to the admission of the third partner into the firm, cannot bind him without his assent by accepting a bill drawn by the creditor upon the firm in their joint names. *Shirreff v. Wilks* 509

— **4. Bill of Exchange—Unauthorized acceptance.**—Where one partner puts the name of the firm to a bill of exchange, but the person at whose request it is done knows that it is not in the partnership account, nor for their benefit, but is the act of the partner only, he cannot sue the firm on the bill. *Arden v. Sharpe* 748

— **5. Dissolution.**—A fair dissolution of partnership between two: one retiring; and assigning the partnership property to the other; and taking a bond for the value and a covenant of indemnity against the debts; the other continued the trade separately a year and a half; and then became a bankrupt. The Lord Chancellor was of opinion, the joint creditors had no equity attaching upon partnership effects remaining in specie; and at all events such a claim ought to be by a bill, not a petition.

Various modes of dissolution of partnership; and the consequences. *Ruffin, Ex parte* 237

PEER—Privilege of. *See Libel, 2.*

PENALTY. *See Contract, 2.*

PEW.—A pew in the aisle of a church may be prescribed for as appurtenant to a house out of the parish. *Qu.* as to a pew in the body of the church? *Davis v. Wittle* 708

PLEADING.—The stat. 4 Ann. c. 16, s. 4, giving power to plead several matters does not extend to actions at the suit of the King. *Rex v. Caldwell* 711

And see Easement.

POSSESSION. *See Vendor and Purchaser, 3.*

POST OBIT. *See Bond, 3.*

POWER OF APPOINTMENT—1. Power to appoint for the benefit of a married woman and her family would not include the husband in general; but upon the whole will an appointment in his favour was established. *Muckroth v. Bacon* 11

— 2. Under a power to appoint among several objects each must have a share, and, by the rule in equity as to illusory appointments, a substantial share, unless a good reason appears; as, another provision by the person executing the power, not from any other quarter. Under such a power an appointment of a fund, nearly 1,900*l.*, among three children, the objects, 10*l.* to one, 50*l.* to another, and the remainder to the third, all having other provisions *aliunde*, was set aside as illusory.

Power to appoint to the use of such child or children, &c.: an appointment to one or more good.

A power to appoint among several objects well executed at law by giving each a share, however small. *Kemp v. Kemp* 182

PRACTICE—1. **Costs.**—In an action of waste on the statute of Gloucester against tenant for years, for converting three closes of meadow into garden ground, if the jury give only one farthing damages for each close, the Court will give the defendant leave to enter up judgment for himself. *The Governors of Harrow School v. Alderton* 546

— 2. **Security for costs.**—The Court will not compel security for costs in error on the ground of the plaintiff in error being a lunatic. *Steel v. Allan* 647

— 3. **Leave to inspect documents.**—Pending an action by a corporation for tolls, the Court will not grant leave to inspect the corporation muniments on the application of the defendant, a stranger to the corporation. *The Mayor &c. of Southampton v. Graves* 480

And see Criminal Law, and Evidence.

PROMISSORY NOTE.—1. A plaintiff having claimed upon a promissory note, which is invalid for want of a proper stamp, is not debarred from claiming upon any ground of action which he can prove without the aid of the note. *Farr v. Price* 515

— 2. A note promising to pay "on the sale or produce, immediately when sold, of the White Hart, St. Alban's, Herts, and the goods, &c. value received," cannot be declared upon as a promissory note within the statute, though it be averred, that before the actions commenced the White Hart and the goods were sold. *Hill v. Halford* 632

— 3. Where a debtor makes a payment generally, without directing the appropriation, it shall be taken to be a payment on account of the subsisting debt, and on no other account. *Hammersley v. Knowles* 764

And see Wager.

PUBLIC-HOUSE.—Covenant not to assign. *See Covenant, 2.*

QUO WARRANTO. *See Election.*

REPAIR—Of ship. *See Ship.*

RIVER—Obstruction of Navigation. *See Nuisance.*

SALE OF GOODS.—1. A. entrusted B. with goods to sell in India, agreeing to take back from B. what he should not be able to sell, and allowing him what he should obtain beyond a certain price, with liberty to sell them for what he could get if he could not obtain that price; B. not being able to sell the goods in India himself, left them with an agent to be disposed of by him, directing the agent to remit the money to himself in England. Held that A. could not maintain trover against B. for the goods. *Bromley v. Coxwell* 648

— 2. **Stoppage in transitu**.—A. living at N. in Devonshire, ordered goods of B. in London, who sent them by ship, *via* Exeter, consigned to A. and advised him thereof. On their arrival at Exeter they were delivered to C. a wharfinger who received them on A.'s account, and paid the freight and charges; after their arrival A. wrote to B. informing him that in consequence of his affairs being deranged he should not take the goods, and telling him that they were at Exeter; at this time A. had committed an act of bankruptcy, upon which he was afterwards declared a bankrupt. B. applied to C. for the goods, and tendered him the freight and charges due; upon which C. promised not to deliver them out of his custody, but afterwards did deliver them to the assignees of A. though indemnified by B. Held 1st, that B. had a right to stop the goods in the hands of C.; and 2ndly, that he might maintain trover for them against C. *Mills v. Ball* 653

SEAL.—The common seal of the city of London proves itself. *Doe d. Woodmass v. Mason* 718

SECURITY FOR COSTS. *See Practice, 2.*

SETTLEMENT (MARRIAGE).—1. **Covenant to leave by will**.—Covenant by a father to give or leave by his will all his personal estate equally among his children does not deprive him of the right of unlimited expense, and of any fair application, even by gift, if absolute, and *bonâ fide*; but a disposition for the purpose of defeating the covenant cannot stand: therefore transfers of stock to one of the children by the father were upon the circumstance of a reservation of the dividends for his life and other evidence of a partial intention, to elude the covenant, set aside. *Jones v. Martin* 32

— 2. **Defective execution of ante-nuptial agreement**.—Articles before marriage for settling real estates of the husband and also all and singular his personal estate of what nature or kind soever: a proper execution would be by a covenant, that any real estate which should be purchased with the personal estate, should with respect to the objects of the settlement be considered personal estate. The settlement therefore, made after marriage, containing no such covenant, and being in other respects a defective execution, real estates purchased by the husband, according to the evidence in order to defeat the right of his wife, were decreed to be conveyed by his devisees according to the articles.

A gift by him in his life in consideration of service was not disputed; but under the particular circumstances attending the marriage, and in the case of an infant, the Court appeared to question its validity. *Randall v. Willis*

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— 3. Upon the bill of a married woman, entitled to a share of the personal estate as one of the next of kin of the intestate, against her husband, and the administrator, the latter claiming to retain towards satisfaction of a debt by bond from the husband to him, it was declared, he was not entitled to retain; but that the plaintiff's share was subject to a farther provision in favour of her and her children; the settlement on her marriage being inadequate to the fortune she then possessed; and it was referred to the

Master to see a proper settlement made on her and her children; regard being had to the extent of her fortune and the settlement already made upon her. *Lady Elibank v. Montolieu* 151

SETTLEMENT (MARRIAGE)—4. Portion ves'ed in the case of parent and child by implication from the whole settlement, against express words; and a clause of survivorship upon the death of a child, before the portion should become payable, was upon the authorities construed, before it should be vested.

Posthumous child to be considered as living. *Hope v. Lord Clifden* . 364

SETTLEMENT (VOLUNTARY).—1. A son, tenant in tail in remainder, when just of age, in 1769, joined his father, tenant for life, in a recovery, for the purpose of raising 3,000*l.* for the father, and re-settling the estate; the son taking back only an estate for life, with remainder to his first and other sons, &c. Whatever equity he might have had against that settlement was lost by his marriage and acquiescence till after the death of his father in 1793; though under the circumstances there was no probability of issue. Upon that ground a bill by trustees under a general trust for his creditors, claiming as purchasers under the statute 27 Eliz. c. 4, was dismissed; without deciding, whether they could sustain that character; or, how far a settlement, merely as being voluntary, is affected by the statutes of Elizabeth. *Brown v. Carter* 191

— 2. A deed of trust conveyed the lease of a farm, and all the grantor's effects, and all debts due to him, to trustees, in consideration of a certain sum to be paid to him by one of the trustees, in trust to dispose of all the property, and out of the produce to reimburse the trustee the sum advanced by him to the grantor, and all other the trustee's demands upon him, and then to pay all such debts as were justly due from the grantor, as the trustees in their discretion should think proper, the surplus to be holden for the benefit of the grantor's wife (whose property the bulk of it originally was) as a separate maintenance for her in consequence of a separation between them, on account of her husband's ill usage; held that such deed was not fraudulent or void as against creditors, it appearing to have been made *bonâ fide* at the time, and that all the creditors of the grantor known at the time had, upon application to the trustees, received payment of their debts. *Nunn v. Wilmore* 434

SHIP—Liability for repair.—If A. let his ship to B. for a voyage, engaging to keep it in repair during the whole time, for which he is to receive freight on the return of the ship; and for the safety of the ship it becomes necessary during the voyage to put into a port to refit; the expense of refitting must be borne entirely by A.; and B. is not liable to contribute to it in proportion to his interest in the cargo, as for a general average. *Jackson v. Charnock* 425

And see Carrier, 1.

SOLICITOR.—Sale of annuity to client.—Sale of an annuity by an attorney to his client set aside under the circumstances.

General rule, that he who bargains in matter of advantage with a person placing confidence is bound to shew that a reasonable use has been made of that confidence. *Gibson v. Jeyes* 295

SPECIFIC PERFORMANCE, of agreement for lease.—*See Landlord and Tenant*, 10.

And see Vendor and Purchaser.

STOPPAGE IN TRANSITU. *See Sale of Goods*, 2.

- **TIMBER**—Unauthorized cutting of. *See Injunction*.

TITHE—Title.—Writ of entry and subsequent proceedings in a recovery amended by inserting the words "all and all manner of tithes whatsoever, yearly arising, &c. from and out of the said premises," on an affidavit setting out the vouches's title to the tithes, and stating his intention to have passed all his interest in the premises; the word "hereditaments" being contained in the deed to lead the uses. *Dowse v. Reeve* . . . 706

TOLLS—Mortgage of. *See* Mortgage, 3.

TRESPASS.—If the judgment of statutory commissioners in certain cases be declared final by statute, their judgment cannot be questioned in an action of trespass. *The Earl of Radnor v. Reeve* . . . 630

And see Assault and Easement.

TRUST—Secret. *See* Will, 29.

TRUSTEE—1. For sale.—There is no rule that a trustee to sell cannot be the purchaser; but, however fair the transaction, it must be subject to an option in the *cestui que trust*, if he comes in a reasonable time, to have a re-sale; unless the trustee, to prevent that, purchases under an application to the Court. *Campbell v. Walker* . . . 135

— 2. Fraud—Negligence.—Bill to charge a trustee, as having by delivering the title deeds to the tenant for life enabled him to make a mortgage of a settled estate as tenant in fee, dismissed: the fraudulent purpose of enabling him to mortgage resting upon the evidence of a single witness, and being positively denied by the answer, as far as the allegations of the bill gave an opportunity of answering; but without costs, on the ground of negligence; and without prejudice to an action; and with an option to the plaintiff to take an issue. *Evans v. Bicknell* . . . 245

— 3. Loss of trust funds.—No tacking against creditors or assignees for valuable consideration.

Trustee not charged with a loss by the failure of the banker to the agent; in whose hands the money was deposited pending a transaction for the change of a trustee.

Consideration of what is necessary to constitute an effectual appropriation of property by a trustee to make good a loss arising out of a breach of trust committed by him. *Adams v. Claxton* . . . 263

And see Will.

VENDOR AND PURCHASER — 1. Specific performance. — A purchaser of land cannot resist specific performance on the ground that the property (a meadow) was sold without mention of the fact that there was a way round it, and a footpath across it, such easements being apparent. *Bowles v. Round* . . . 107

— 2. A vendor cannot come at any distance of time for a performance: but upon a bill, filed fourteen months after the correspondence upon the objections to the title ceased by the defendant's returning no answer to the last letter, calling for a distinct answer, and threatening a bill, and the auctioneer not having been called on to return the deposit, it was referred to the Master. *The Marquis of Hertford v. Boore* . . . 149

— 3. Specific performance refused on account of the laches of the plaintiff, the vendor.

A small incumbrance, which may be the subject of compensation, no objection to a specific performance.

Possession of a house by delivery of the keys. *Guest v. Homfray* . 176

— 4. Contract for the sale of houses; which from defects in the title could not be completed on the day. The treaty however proceeded upon a proposal to waive the objections upon certain terms. The houses being burnt before a conveyance, the purchaser is bound, if he accepted the title; and the circumstance, that the vendor suffered the insurance to expire at

the day, on which the contract was originally to have been completed, without notice, makes no difference. A reference to the Master was therefore directed to inquire, whether the proposal was accepted, or acquiesced in, on behalf of the purchaser. *Paine v. Meller* 327

And see *Trustee*, 1.

WAGER—Contract against public policy.—An action will not lie on a promissory note given in payment of a wager on the amount of the hop duties. *Shirley v. Sanky* 558

WARRANT—Duplicate. See *Evidence*, 5.

And see *Officer*.

WARRANTY—1. *Mistake*.—The putting down the name of an artist in a catalogue as the painter of any picture, is not such a warranty as will subject the party selling to an action, if it turns out that he might be mistaken, and that it was not the work of the artist to whom it was attributed. *Jendwine v. Slade* 754

— 2. *Of safe delivery of goods*. See *Carrier*, 3.

— 3. *Of neutrality*. See *Insurance (Marine)*, 13, 14.

WASTE. See *Landlord and Tenant*, 12, 13.

WILL—1. *Administration*.—The personal estate being amply sufficient for the debts, though not equal to the discharge of the legacies in full, the Court would not marshal the assets in favour of the legatees, by throwing the specialty creditors on the land comprised in the residuary devise.

As to the difference between debts and legacies in an implied charge on real estate by will, *Quære*. *Keeling v. Brown* 70

— 2. *Annuity*.—Bequest of an annuity of 200*l.* for the use of A. and her children, to be paid out of the general effects until it is convenient to the executors to invest 5,000*l.* in the funds in lieu thereof for her and their use, and to the longest liver, subject to an equal division of the interest, while more than one alive: held an annuity, not an absolute legacy. *Innes v. Mitchell* 360

— 3. *Construction*.—Bequest to the testator's wife for life; then, after an appropriation to answer annuities, to the children of the testator's brothers and sisters. All the children living at the death of the testator and those born afterwards before the death of the wife had vested interests; a codicil in favour of the same objects, only restrained to those surviving at the time of distribution, being held to apply only to the capital of the fund appropriated to the annuities. *Middleton v. Messenger* 1

— 4. *Residuary disposition* of all the testator's real and personal estate in Jamaica, in trust to be remitted to England, was held specific, and not to include a debt, originally upon bond and judgment in Jamaica, and afterwards farther secured by bond and judgment in England, under which it was received, and being considered undisposed of was applied in the first instance to the debts, &c. Executors having legacies of 20*l.* a-piece to buy mourning rings and equal specific legacies were upon the former held trustees of the undisposed of residue for the next of kin. *Nisbett v. Murray*. *Murray v. Nisbett* 4

— 5. *Residuary bequest* to a very large amount in favour of infant grandchildren, payable at twenty-one or marriage, with survivorship, the interest to accumulate and be paid with the capital; and in case of the death of all before the time of payment, over to their mother absolutely. The father's income, though considerable, bearing no proportion to the fortune bequeathed, and there being several children, the Court directed maintenance, taking the consent of the mother. *Cavendish v. Mercer* . 25

— 6. A clear vested interest not divested: the express contingency, upon which it was to be divested, not having happened.

Bequest to A. for life, and after her decease to B. and C. in equal moieties; and in case of the decease of either in the life of A. the whole to the survivor of them living at her decease. B. and C. having both died in A.'s lifetime. Held the devastating clause had no operation. *Harrison v. Foreman* 28

WILL—7. Under a disposition by will to the children of A. and B. payable at twenty-one or marriage, with a limitation over upon failure of issue in the lives of A. and B. it was held, that all the children without restriction were entitled; and an apportionment being directed, and the interest ordered to be paid to those, who had attained twenty-one, children born afterwards, though entitled to a share of the capital, were not allowed to claim the by-gone interest. *Mills v. Norris* 36

— 8. A legatee, son-in-law to the testator, was held entitled to his legacy, discharged from debts due by him to the testator, and a debt, for which the testator was his surety, upon evidence from the testator's accounts, letters, and memoranda in his hand-writing. *Eden v. Smyth* 60

— 9. Testator bequeathed 5,000*l.* in trust for his daughter A. for life, and after her decease for such child or children, as she shall leave at her decease, in such shares as she should think proper; and in case she shall die, leaving no child (which was the event), then as to 1,000*l.* for her executors, administrators, or assigns; and as to the remaining 4,000*l.* in trust for such person or persons "as shall be my heir or heirs at law."

The 4,000*l.* vested in A. and the other two daughters of the testator, being co-heiresses at law and next of kin at his death.

If that union of characters had not occurred, *Quære*, whether the next of kin could not claim. *Holloway v. Holloway* 81

— 10. Devise of real estates to trustees and their heirs, upon trust to convey upon certain trusts; and, subject thereto, to several natural sons successively in strict settlement. The testator also gave the residue of his personal estate upon trust to be laid out in land, to be settled to the same uses, &c. A codicil revoking so much of the will as directed the settlement of his said estate upon his sons, and varying the order of the limitations, was considered as operating by way of substitution only, and not as indicating any sufficient intention to sever the union of the residuary personal estate with the devised real estate.

Testator by codicil revoked the legacy of 50*l.* bequeathed to his sister. The only legacy given her was 100*l.* given by the will. The effect of the codicil considered. *Lord Carrington v. Payne* 87

— 11. Residuary bequest to the testator's nephews and nieces *per stirpes* equally for their lives; and after the death of either that share of the principal to be paid equally to and among the children of such of his said nephews and nieces as should die; and if any die without leaving any child or children, that share to go to and among the survivors or survivor of them in manner aforesaid.

Upon the death of one without a child that share goes to the survivors for their respective lives only, and will pass to their children respectively with the original shares: but upon the death of the last survivor without a child his shares, both original and accrued, are undisposed of; notwithstanding another has left a child. *Milsom v. Awdry* 102

— 12. To exempt the personal estate from the payment of the debts the will must afford a necessary implication: viz. that inference, that leaves no doubt upon the mind of the Judge.

Testator gave, devised and bequeathed, all the messuages, lands, tenements, and hereditaments, whatsoever and wheresoever, and all his monies in the funds, to trustees, their heirs, executors, administrators and assigns, according to the several and respective estates and interests therein; and

declared the trusts of the rents, issues, and profits, dividends, interest, and proceeds, subject to ground-rents and other outgoings in respect of his said messuages, lands, &c.: the leasehold estates pass with the freehold upon the subsequent words. *Hartley v. Hurl* 113

WILL—13. Bequest of personal estate exempt from debts by mortgage: the benefit of the exemption was confined to that legatee; and failed; the bequest having lapsed by the death of the legatee in the life of the testator. *Waring v. Ward* 130

— 14. Implication in a will cannot prevail, unless necessary.

Whether the Journals of the House of Lords, delivered to a Peer, go with the title, *Quære*.

Devise after the death of the deviser's wife: if the devisee is heir, the wife takes for life by implication: otherwise not. *Upton v. Lord Ferrers* 167

— 15. A clause of survivorship between two legatees, if either of them should die, confined to a case of lapse, and did not prevent the legacies vesting. *King v. Taylor* 172

— 16. An illegitimate child not entitled under the description of a child in a will; though the testator knew the state of the family, viz., several illegitimate and no legitimate children.

A bequest to a particular description of persons at a particular time vests in persons answering the description at that time exclusively.

Therefore an annuity being bequeathed over upon the death of the annuitant to the eldest child of A., there being at the death no child, an afterborn child is not entitled. *Godfrey v. Davis* 204

— 17. The word "when" in a will, alone and unqualified, is conditional: but it may be controlled by expressions and circumstances; so as to postpone payment or possession only, and not the vesting: as, where the interest of the legacy in the interval was directed to be laid out at the discretion of the executors for the benefit of the legatees, it vested immediately.

Distinction between a legacy at twenty-one and payable at twenty-one, borrowed from the Civil Law but disapproved. *Hanson v. Graham* 277

— 18. Legacy after limitations for life and in default of children to be paid equally between two persons or the whole to the survivor of them, held not vested till the time of division. *Daniell v. Daniell* 308

— 19. A bequest for all and every the child and children of A. includes every child born before the period of distribution: which, in this case was the attainment of the age of twenty-one by the eldest, the marriage of a daughter, or the death of a child under twenty-one, leaving issue. Upon the general rule a child by a subsequent marriage was included, notwithstanding a strong implication in favour of children by the prior marriage.

Dividends on specific legacy of stock from the death of the testator.

Costs of a doubt upon the meaning of the will out of the general property. *Barrington v. Tristram* 322

— 20. Portion raised out of a reversionary term. The rule is, that it depends upon the particular penning of the trust and a fair construction of the whole instrument as to the intention.

Upon a limitation to the parent for life with a term to raise portions at twenty-one or marriage, if there is nothing more, and the interests are vested, and the contingencies have happened, at which the portions are to be paid, upon the general rule the interest is payable, and the portions must be raised by sale or mortgage of the term. *Codrington v. Lord Foley*. *Lord Foley v. Codrington* 332

— 21. Testator directed the residue of his personal estate, subject to the payment of legacies, annuities, debts and funeral expenses, with all convenient speed to be laid out in real estates, to be settled in strict settlement;

and that the interest of such residue should accumulate and be laid out in lands to be settled in like manner. Various circumstances having delayed the collection and investment of the personal estate, the tenant for life was held entitled to the interest from the end of a year after the death of the testator.

General rule, that legacies, where no interest is given by the will, shall carry interest at 4 per cent. only, and from the end of a year after death of the testator; except where it is given by way of maintenance; though the fund produces more; and the interest shall not be increased by the effect of appropriation.

A legatee having taken a mortgage in part payment subject to an agreement for payment out of the other assets and a resumption of the mortgage, was held entitled to the benefit of that agreement; accounting for the difference of interest. *Sitwell v. Bernard* 374

WILL—22. Power to X. to give "said effects" to Y. for life, following residuary bequest in a will of land and goods to X. for life, construed to include a power over the land. *Doe d. Chillcott v. White* 502

— 23. Under a general devise of all manors, messuages, lands, tenements and hereditaments, leasehold messuages will not pass, unless it appear to have been the evident intent of the devisor that they should pass. *Thompson v. Lady Lawley* 595

— 24. The rule in *Will's case* (whereby a gift to A. and his children, A. having no child at the time of the devise, creates an estate tail in A.) applies, although the testator gives the parent an express power of appointing the estate amongst his children. *Seale v. Barter* 676

— 25. **Contingent legacy.**—A contingent legacy failed: the event, which happened, not being provided for; and no necessary implication in favour of the legatee. *Parsons v. Parsons* 120

— 26. **Double portions.**—A claim of double legacies by two instruments; a will and a codicil, repelled by the internal evidence and circumstances.

The rule against double portions may supply a ground for excluding the presumption that such legacies are cumulative. *Osborne v. The Duke of Leeds* 74

— 27. **Gift to charitable uses.**—Trust by will for building or purchasing a chapel, where it may appear to the executors to be most wanted: if any overplus, to go towards the support of a faithful gospel minister, not exceeding 20*l.* a year; and if any farther surplus, for such charitable uses as the executors should think proper. The whole trust void, not only as to the real estate and a mortgage, but also as to all the personal estate; and the real estate went to the heir at law; and the personal to the next of kin. *Chapman v. Brown* 351

— 28. **Illegitimate child.**—An illegitimate child not entitled to share under a devise to children generally, notwithstanding a strong implication upon the will in favour of that child. *Cartwright v. Faudry* 108

— 29. **Secret trust.**—Bill by the heir-at-law against residuary devisees, legatees, and executors; suggesting a secret trust, undertaken at the request of the testator, either not legally declared, or, if so, void as to the real estate, and written acknowledgments by the defendants of an intended trust for charitable purposes: the will also by equal legacies to them, and some particular expressions, importing a trust. A general demurrer to the discovery and relief was over-ruled. *Muckleston v. Brown* 211

— 30. **Unattested paper not clearly specified by will.**—Legacies out of real estate, given by an unattested paper, cannot stand, unless that paper is clearly referred to by a will duly executed; so as to be incorporated with it: in this instance there being no such clear reference upon the con-

tents of the instrument, the legacies failed : the circumstance, that a paper was found inclosed in the same cover with the will, indorsed as his will, not being sufficient. *Smart v. Prujean* 395

WILL—31. Covenant to leave by. *See* Settlement (Marriage), 1.

— 32. Liability for loss by failure of solicitor co-executor. *See* Executor.

WITNESS—Attachment for disobedience of subpoena.—A subpoena may be issued from the Crown Office, requiring a witness to attend at the assizes in the country to give evidence in support of an intended prosecution for a felony; and this Court will grant an attachment against him for not attending in obedience to the subpoena. *Rex v. Ring* 478

WORDS—Construction.—*Prima facie* words must be understood in their legal sense, unless by the context or express words plainly appearing intended otherwise. *Holloway v. Holloway* 81

WRIT, of entry. *See* Tithe.

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